Nos. 23, 24 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; BLAINE S. SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A TO BRIEF OF RESPONDENTS

A TOPICAL DIGEST OF THE EVIDENCE

VOLUME IV

Part XIV—Dealers and Manufacturers' Dealer Policies
Part XV—Terms and Conditions of Sale
Part XVI—Foreign Cement
Part XVII—Pacific Coast
Part XVIII—Some Expressions by Cement Executives as to Some Aspects of Competition
Part XIX—The Views of Economists as to Cement Pricing Methods and Marketing Practices
Part XX—Alternative Marketing Methods

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Corrections to Volume IV

Page 2247, last line —Insert "36" before "Part I, etc."

Page 2371 —Place indicator for fn. 3 at end of italicized quotation in center of page.

" 2721, line 16—Change "50%" to "50¢".

" 2751, line 16—Insert "pp. 1787-90" after "Part IX B".

" 2961, line 33—Insert "pp. 2546-58" after "Part XIV, Sec. G, 6".

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PART XIV

DEALERS AND MANUFACTURERS' DEALER POLICIES

Introduction

For the past 30 years a considerable majority of all cement has been sold by manufacturers to dealers, generally building material dealers, who distribute it at retail in their respective communities. The manufacturers also sell direct to certain classes of users, federal and state governments, railroads and other large commercial users, cement block and pipe manufacturers and contractors on certain classes of jobs.[1] While such direct sales increased within the last few years, they are still the smaller part and compose the occasional, rather than the regular, business of the manufacturer.

The marketing of cement, therefore, is affected (1) by the importance of dealers, (2) by the determination of who are dealers, (3) the distinction in the classes of trade to be served by and through the dealer, (4) the protection of the dealer's interest, and (5) the influence of the dealers in forcing all manufacturers to sell to every dealer in the same competitive area upon the most favorable terms offered them by any manufacturer. The evidence upon these important factors in determining the marketing policies of the manufacturers in their relations with dealers is herein arranged under these groupings.

A. Importance of Dealers.

1. Dealers' Share in the Sale of Cement

Evidence as to the importance of dealers as customers of the manufacturers—in terms of the percentage of the total sales to dealers—is shown on the chart opposite page , Part I and reference is made to that chart.

[1] Fdgs., Par. 3(c).

2. Statements of the Function, Advantage and Importance of Dealers

The dealer, beside being the most regular and largest customer, performs many useful and necessary functions in the marketing of cement, among others, warehousing, sales of less than carload lots, solicitation of small customers, the supplying of technical assistance to contractors in connection with construction work and carrying the credit risks of such accounts.[1] Dealers occupy a necessary part of the distribution system and can distribute the product on many classes of business much cheaper than could be done directly by manufacturers.[2]

Contractor business is less desirable because contractors are less reliable from the credit point of view and they

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[1] Resp. Ex. 21; Lone Star's "Trade Ethics and Marketing Policies" 1929, pp. 34-35.
Resp. Ex. 2567: Edison pamphlet for salesmen dated 1/5/18.
Coogan, Vice President, Alpha (R) Tr. 23605-07.
Bowen, Vice President, Lehigh (R) Tr. 26751-52.
Brobston, President, Hercules (R) Tr. 26022, 26026-27.
McKee, Vice President, West Penn (R) Tr. 27753-54.
Hartley, Sales Manager, South Dakota State Cement Plant (R) Tr. 41497-99.
Manley, General Manager, Hawkeye (R) Tr. 41629.
Hoenig, Sales Manager, Nebraska (R) Tr. 41962-63.
Brooke, Vice President, Monarch (R) Tr. 42193-94.
Crapo, Vice President, Huron (C) Tr. 11364.
Runion, Secretary, Nebraska Lbr. Merchants Assn. (C) Tr. 12050-52.
Sunderland, President, Ash Grove (C) Tr. 13732-33.
Davis, President, Superior (R) Tr. 29598.

[2] Warren, Vice President, Southwestern (R) Tr. 29073.
Hartley, *supra*, Tr. 41499-500.
Manley, *supra*, Tr. 41629.
Hoenig, *supra*, Tr. 41963.
Brooke, *supra*, Tr. 42193-94.
Sunderland, *supra*, Tr. 13732-34.

are more prone to shop around to seek a better bargain rather than remain the customers of a given company.[3]

While the federal and state governments have become increasingly large purchasers of cement since 1910 they have often not been satisfactory customers (1) in that they may require specially tested cement which must be stored at additional expense and (2) take the benefit of cash discounts regardless of whether or not they are entitled to it and because government contracts are often little more than options to purchase.[4] Many companies have not sold a large amount to federal or state governments or both.[5]

The most complete statement in the record concerning the building material dealer, his relation to the community in which he sells and his importance to the manufacturers whose products he stocks, and the consideration which he invokes at the hands of the manufacturers is set forth in the statement of policy published by Lone Star in 1929, before the Institute was organized. All of the witnesses who testified upon this subject supported the importance of the dealer who is equipped to serve his community on

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[3] Dannelly, Vice President, National (R) Tr. 39533-34.

[4] Coogan, Vice President, Alpha (R) Tr. 24034-35.
Scott, H. M., President, Keystone (R) Tr. 27561-62.
Elliott, Vice President, Whitehall (R) Tr. 28608-17.
Warren, G. E., Vice President, Southwestern (R) Tr. 28959-62.
Ackerman, Vice President, Lawrence (R) Tr. 31195-98.
Warren, F. B., Vice President, Bessemer (R) Tr. 32150-51, 32322-23.
Bates, J. E., Sales Manager, Federal (R) Tr. 30606-08.
Koch, Vice President, Lone Star (R) Tr. 32739.
Russell, Vice President, Peerless (R) Tr. 34231-32, 34242-44.
Elcock, Vice President, Southern States (R) Tr. 37576-77.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38148-49.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39008-09.

[5] See Chart I-C, p. 37.

one or another of the grounds stated by Lone Star, as follows:

"Our policy is to sell our product through dealers in similar commodities, and we believe this policy is fundamentally sound. We believe that the retail dealer in general building materials, of which cement is but a small part, is an important individual in his community; that his is an established business enterprise, depending upon the prosperity of the community more, perhaps, than does any other class of retail dealer; that his business is more closely identified with the progress of his town than most others, and that, in order to derive an adequate income from his business, he must not only be well established in his community, serve his customers satisfactorily and have for sale the commodities that are wanted, but must also wait upon the upbuilding of the town for his advancement. We believe this for the following reasons:

1. His is often the first important enterprise in any new locality, and a pioneer in the development of that locality.

2. He is a resident of the community.

3. He pays his share of taxes in the community.

4. He is expected to support in a public-spirited manner charities, welfare drives and various movements for the good of his community.

5. As a property holder, he is interested in the upbuilding of his town and in its civic affairs; he assists the promotion of schools, public buildings, streets, sewers, lighting, water, electricity, and other improvements; in the present housing situation he is an important factor in the building of new homes.

6. He has an investment, as required by the volume of his business, in lands, buildings, transportation facilities, and in the stocks of the commodities he sells.

The Retail Dealer in Cement Performs a Useful Service

We believe that the retail dealer of cement is just as essential as is the retail dealer in food, clothing, drugs or any other of the many enterprises that are considered necessary in every community. We believe he performs a real and useful service to his community—a service for which every other branch of retailing receives a profit, and for which the cement dealer deserves a profit. We believe this for the following reasons:

7. He serves his community as fully as does any other distributor of the necessities of life; next to food and clothing, the commodities he sells are the most necessary to the maintenance of life, the protection of health and the promotion of happiness, he is a promoter and a producer of homes.

8. He assists architects, engineers, builders, contractors and the public generally in planning, promoting, financing and constructing local work of every kind; he helps in making better homes and improving living conditions.

The Retail Cement Dealer Greatly Facilitates Building

9. He gathers together, from many different and distant sources, stocks of materials necessary for all kinds of building and construction, maintains such stocks and thus enables builders, contractors and others to secure these materials in desired quantities, whether large or small, without loss of time, without any trouble and expense incident to their purchase and delivery.

10. He watches market and transportation conditions as they affect the varied commodities he handles; buys to advantage in every way possible, and thereby creates a saving to his customers, thus aiding in reducing the cost of building.

11. He frequently carries in stock lumber, forms, aggregate and other requirements used in concrete construction, thus enabling builders, constructors and others to secure these requirements without inconvenience.

12. He renders valuable service in making and arranging for deliveries, when, where and as required, and frequently under most pressing conditions.

13. He handles the bags in which cement is shipped; pays for them, sends them out, receives them back, gives his customers credit when they are returned, and frequently suffers actual money loss when they are returned unfit for further use, or not returned at all.

14. He employs anywhere from a few to a great many men and women, invariably local people of his own community.

15. He conducts a business in large, bulky, heavy and difficult-to-handle material which runs into large volume and, in the case of cement, does it on a margin which would be considered entirely inadequate by most retail establishments.

THE MANY-SIDED SERVICE RENDERED BY THE RETAIL CEMENT DEALER.

The above outlines our attitude with regard to the standing of the retail dealer and the service he renders his community.

The dealer is of value to our company in every one of the ways mentioned above, because he makes it possible for us to get our product to the ultimate user quickly, economically and conveniently. But in addition to this, there are even more important reasons why we follow the policy we do. These reasons are as follows:

16. Having an investment and being a permanent establishment in his community, he is active twelve months in the year in promoting the

use of cement, whereas the casual user may require a quantity for some specific purpose, and never need any more in the same locality.

17. The dealer will probably buy and sell many times the quantity of cement consumed by any individual user during any one year, and will continue to do so for succeeding years; the dealer's business is a continuous performance.

18. Being on the ground, the dealer is much better qualified to pass on the credit of local users and secure payments as the work progresses, frequently helping contractors and others complete work by extending credit or arranging for it through local banks. Many dealers finance various local users as far as the purchase of building materials, including cement, is concerned. Because of greater credit protection through direct contract and delivery, he can grant better terms on all material than could any individual cement company on cement alone.

IT COSTS THIS COMPANY LESS TO SELL ITS PRODUCTS THROUGH DEALERS

19. It would be far more expensive, in fact, almost prohibitive, for this company to undertake to sell its product to the thousands of users of cement who operate in the territory where our product is used. The cost of this sales work would add to the cost of cement. The dealer is not only a distributing factor, he is a selling factor as well.

20. Dealers as a class are among the more progressive and successful men in their community and therefore rate high as a credit risk.

21. Without the dealer as a central point of distribution, cement, because of its great weight per unit and high freight rate in less than carload lots (approximately two and one-half times greater than carload lots), would greatly increase in cost, especially in smaller towns.

> Its use would be curtailed through competition with other materials, or increased construction cost in that community would result. We know of some towns where a minimum car of 132 barrels shipped to the dealer has been sufficient to meet the demand for a year.'"[6]

In 1924, Morris Kind, the then President of Hercules, prepared a paper for publication on "How Portland Cement is Distributed" in which he described the function of the dealer and his importance both to the manufacturer and to the consumer.[7]

Coogan, Vice President of Alpha, testifying as to the function, services, and advantages of the dealer in distributing cement, said:

> "A. Well, a dealer performs an active service in the distribution and sale of cement. He carries stocks on hand; he makes deliveries when and as required; he takes care of local requirements in his town; he takes care of credits, and all other matters which a dealer usually performs.
>
> Q. Would you say that a manufacturer is or is not in a position to perform those dealer services? A. A manufacturer cannot perform the services performed by a dealer.
>
> Trial Examiner Norwood: That is as to small orders, and so forth?
>
> The Witness: As to the small orders and as to delivering from the cars to the site of the job. Very often even on a large order it must be transported from the railroad siding to the job. Now, in a great many cases a great many contractors do not have facilities for doing that, and they prefer to do their business through the dealer.

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[6] Resp. Ex. 21: Lone Star pamphlet: "Trade Ethics and Marketing Policies."

[7] Resp. Ex. 1108.

By Mr. Leisure:

Q. Well, is it your experience that a dealer is or is not a valuable connection between the manufacturer and the normal work that comes up in cities, towns, and villages? A. A dealer is a very valuable connection for a cement company. I have told you that I remember in our industry—in our own company—when we handled 90 percent of our business through dealers. Now, there has been a trend towards more direct business, partly brought about by the jobs being larger, and different classes of work, and also competition on the part of manufacturers. Because, if one man, or an important competitor should decide to quote a certain kind of a job direct, why we have nothing to do except to either meet that or to forego any chances of getting their business, because my dealer cannot quote a price in competition with a direct consumer price made by another company. He must have some profit if he is going to remain in business.'"[8]

Executives of other respondents gave their reasons as to the importance of their dealer business, as follows:

Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39857.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29530.
Hercules: Brobston, President (R) Tr. 26022-27.
Huron: Crapo, Vice President (C) Tr. 11364.
Keystone: Scott, H. M., President (R) Tr. 27485-90.
Kosmos: Horner, President (R) Tr. 36818.
Lehigh: Bowen, Vice President (R) Tr. 26751-52.
Marquette: Colburn, Vice President (R) Tr. 39038.
Monarch: Brooke, Vice President (R) Tr. 42193.
National: Dannelly, Vice President (R) Tr. 39533.
Nebraska: Hoenig, Sales Manager (R) Tr. 41962-63.
Petoskey: Lucas, Vice President (R) Tr. 38754.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37707.
South Dakota: Hartley, Sales Manager (R) Tr. 41499-500.
Superior: Davis, President (R) Tr. 29598.
West Penn: McKee, Vice President (R) Tr. 27753.

[8] (R) Tr. 23605-07.

Some part of the dealers' purchases are delivered directly from the manufacturer to the dealers' customers on the job and does not pass physically through the hands of the dealer. As to the services which a dealer renders on sales so delivered, McCracken, Manager of the American Builders Supply Company, a dealer at Louisville, Kentucky, testified:

> "Q. Will you tell us if you perform any services for a manufacturer in the case of business which does not physically pass through your warehouse? A. We feel that we do, in making a sale to the contractor, and seeing that the shipments go to him in a regular order, and keeping him up with his requirements."[9]

At two points in the course of the hearings the following concessions were made:

> "Mr. Wooden: I will make it unnecessary by agreeing to stipulate that the dealer trade, for all Respondents, if they want it that way, is an important factor in their business.
>
> • • •
>
> Mr. Wooden: The greater the importance of the dealer the more probable it is that they defer to the wishes of their dealer, as they have done, and as we approve for them to do.
>
> • • •
>
> Trial Examiner Norwood: It is a large and substantial part.
>
> Mr. Wooden: Yes, that is true.
>
> Trial Examiner Norwood: Of the business of every Respondent.
>
> Mr. Wooden: Yes.
>
> Trial Examiner Norwood: Why try to prove that any more? He has admitted that."[10]
>
> • • •

[9] (R) Tr. 36747.

[10] Tr. 26023-25.

And at a later point the Trial Examiner said:

> "Trial Examiner Norwood: I do not think there is any evidence to the contrary that the manufacturers—the main part of their business, the substantial part is through dealers; that it is a diversified business; that it is more substantial for that reason, goes through many small sources, and does not subject him to violent reactions in the matter of quantity, as between one year and another.
>
> We have gone into that. We know all about that."[11]

B. Definitions of Dealers.

In substantially all published definitions it appears that a dealer is conceived of as a person who maintains facilities for handling cement and regularly stocks it for resale and has a good credit standing. These requisites are constantly stressed by the witnesses.[1]

1. Flexibility of the Concept of a Dealer By Each Manufacturer

As to the necessity for a definition of a dealer in the opinion of Alpha, the flexibility of the definition in its application, and the independence of interpretation of any definition or decision as to who would be treated as a dealer and who would not, Coogan, Vice-President of Alpha, testified:

> "A. Well, if we didn't have some yardstick as to who was and who was not a dealer, certainly we

[11] Tr. 28572.

[1] McGovern, Sales Manager, Hermitage (R) Tr. 36204.
Elcock, Vice President, Southern States (R) Tr. 37528.
Letzkus, Sales Manager, Pittsburgh Plate Glass (R) Tr. 37707.
Hanahan, President, Volunteer (R) Tr. 38640-41.
Lucas, Vice President, Petoskey (R) Tr. 38764-55.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 38960-61.
Dawson, Vice President, Medusa (R) Tr. 40067-68.

could have no classification of customers. We must have some yardstick, and, as I say, we have had that since 1903, and there has been practically little or not change since that time.

By Mr. Leisure:

Q. How many dealers do you have at the present time, Mr. Coogan, roughly? A. We have approximately 3,000 dealers on our books.

Q. Now, with reference to this yardstick that you mentioned, is that a definite concise definition, or is it flexible in any way? A. It is entirely flexible, and we make our own interpretations in each individual case, where the question might arise.

Q. Well, if you make your own interpretations, how are you guided?

Will you explain how you vary your interpretations, if you do? A. Well, in some cases, the size of the town will make a difference. For example, a strict interpretation of your dealer requirements, if applied to all towns, would exclude some dealers in some small towns. I have known of cases where our company, and today we still continue to do it, we sell some customers as dealers who perhaps handle only cement. I know in one case where there is a florist that handles cement in connection with his florist business, and we quote him as a dealer because in that particular town he is our distributing factor for our cement.

Q. Well, what has been your experience? Have you ever been influenced in recognizing a dealer by the fact that a competitor of yours has treated the individual as a dealer? A. No, sir; I have no doubt —in fact, I know of some cases today where some of my competitors consider a man a dealer—I probably wouldn't consider him as a dealer if I were called upon to make a decision.

Trial Examiner Norwood: Wouldn't you find it necessary to do that in order to meet competition of this competitor?

The Witness: I am decided that it is more to my advantage not to meet that particular competition, because it might affect my business in the vicinity of that town.

By Mr. Leisure:

Q. Do you know any instance—have your competitors ever called your attention to the fact that you were considering or recognizing someone as a dealer whom they did not think was a dealer? A. I don't remember of any specific case. I have no doubt that maybe at some time some competitor has said something to us, about certain dealers, but I can't mention any specific case.

Q. Do you know of any instances where you have stopped recognizing that person because of such a complaint? A. Positively not.

Q. Have you ever remonstrated with any competitor as to any person whom he was recognizing as a dealer? A. No, sir; I pay no attention to the dealer connections of the other companies. We make our own interpretations, and we feel that the other man should be entirely free to make his interpretation as to who is and who is not a dealer. I don't think I have ever mentioned to any of my competitors anything about whether any man was a dealer or not.

Q. And is that or is that not the policy of your company? A. It is an absolute policy of our company.

Q. Have you any dealers who sell Alpha cement exclusively? A. I think there are a few, but not very many. They are mostly all served by many different companies.

Q. Have any of your dealer customers ever remonstrated with you, and contended that you were recognizing someone as a dealer whom the other dealer customers did not think was a dealer? A. Yes, that has happened, and it also happens that in a particular time one dealer might object to our selling another dealer in that town, even though he was a bona fide dealer. In other words, that they will—if they give us their business, they will want us to confine our sales to them; but, on the other hand, they don't always confine their purchases to us.

Q. Well, can you tell me any instance where you stopped recognizing such a person as a dealer because of this kind of complaint? A. If I am doing

business in a town, and if I feel that the discontinuance of selling to anybody, whether he might be a dealer or a near dealer, would get me more business in that town, I should certainly not hesitate to discontinue and confine my sales to the people that would give me the most business."[2]

Testifying as to the importance of distinguishing the "legitimate dealer" by some defined concept, Brobston of Hercules testified:

"A. Ever since I have been in business it has been our policy to sell as a dealer only people who carried a real legitimate line of building materials.

Q. Well, what was the purpose of that, Mr. Brobston? What was the purpose of adopting such a method in selling? A. Well, our best customer is the legitimate dealer. If we sell, for instance, a feed store in one town, the dealer in the next town who handles a full line of building materials won't give us any business. If we don't recognize the fact that regularly constituted dealers who have the facilities for handling cement are our customers, we will not get any business from them.

Q. Now, a moment ago, when I asked you about what constituted a dealer, I meant to bring out—I want to bring it out now, at least—what your definition is, if you had one—Did you have one? A. Well, I don't know that we have a regular definition, but we have considered for many years that a dealer was a fully constituted building material dealer who had the facilities for handling cement, delivering it, storing it, warehousing it, in a town in which he operated.

Q. Do you have any hard and fast rule in that matter? A. No, I wouldn't say we have a hard and fast rule. Each individual case—unless we know one to be a dealer—each individual case is investigated as our salesmen report on whether the man is or is not a dealer. When a salesman goes into a town he

[2] (R) Tr. 23625-28.

will find out who the building material dealers are in that town. When he reports to us he gives us the particulars as to their yard and their facilities.

Q. And you say 'facilities'—are they or are they not those who are able to render the services of a retailer? A. Those are the only ones that we sell, yes.

Q. Do you give salesmen any instructions with regard to this? A. There is no hard and fast rule. The salesman is expected to report to us what he finds, and from his report we guess whether the man is or is not a dealer.'"[3]

And later:

"Q. Have you discussed at meetings of competitors what rule should be applied in determining who was to be recognized as a dealer? A. I don't recall having discussed it at any formal meeting. I probably have discussed it with individual competitors many times. That question is apt to come up any time."[4]

And G. E. Warren, Vice-President of Southwestern in charge of its Osborn, Ohio plant, testifying as to why he would sell only those whom he recognized as legitimate dealers and the independence of his determination as to whom they may be, testified:

"A. We are anxious to get our cement into the hands of the users. A large portion of our cement, considerably more than half, is used by the less-than-carload user, and it is a highly perishable commodity, and there are some people who handle cement that I would not want to handle ours. If they do not warehouse properly it will deteriorate, and the customer will get an inferior product. It begins to deteriorate the minute it is exposed to moisture, the moist air, and of course there are many cases of people who can buy from someone who we do not

[3] (R) Tr. 26056-57.

[4] (R) Tr. 26427.

consider a proper credit risk, and there are others to whom we do not sell because we feel we have adequate representation in certain localities.

Q. Mr. Warren, would you tell us whether or not the Southwestern Company has ever agreed with its competitors to limit sales to dealers in accordance with any definition? A. We have not."[5]

Stipulation of W. R. Blair, Sales Manager of the El Paso plant of Southwestern, states clearly the reason for a concept of a dealer and the policy of confining sales to persons who fall within the definition:

"(64) At the present time El Paso restricts the sale of its cement to dealers who can market it well and who are good credit risks. For a long time we have confined our sales to dealers who are able to meet these requirements in their local markets. It is our general policy to limit our sales to dealers, to those who meet this conception of a dealer, because dealers are our most important outlet, and are the main stay in the distribution of our cement. For this reason we must have responsible individuals with good credit who are capable of performing adequately the functions we feel a dealer should perform. This policy has been in effect at our El Paso mill for at least 20 years. We began to confine our sales to dealers, to those who possess these qualifications for the same reason that we adopted the practice of making direct carload sales, namely, that it protected our salesmen and our company from unpleasant and unreliable accounts."[6]

More than a dozen other representatives of manufacturers testified that their respective companies had each a concept of who constituted a dealer and that it had been the same since the witness had been with the company and

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[5] (R) Tr. 29072-73.

[6] (R) Tr. 38960.

most of them stated that the NRA Cement Code definition was a good one and generally satisfactory.[7]

2. Published Definitions of a Dealer

Coogan stated that Alpha had had a concept of a dealer since 1903.[1] This concept was first published in 1916 in a circular by the company to its salesmen, stating

> "A dealer is a merchant, firm or corporation regularly engaged in selling Portland Cement or other merchandise, especially building material, purchased by him for re-sale, who is also properly equipped with storage facilities, teams or trucks, and is recognized in his home town as a building material dealer."[2]

[In 1909 the North American license agreement under which 19 or more companies were licensed and which terminated in 1911 defined a dealer as:

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[7] Com. Ex. 557: NRA Code, approved 11/27/33.
Scott, H. M. (1905), President, Keystone (R) Tr. 27490.
Elliott (1919), Vice President, Whitehall (R) Tr. 28553.
Koch (1923), Vice President, Lone Star (R) Tr. 32828.
McGovern, Sales Manager, Hermitage (R) Tr. 36202.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36483-84.
Horner (1907), President, Kosmos (R) Tr. 36819.
Lucas (1922), Vice President, Petoskey (R) Tr. 38754-55.
Dawson (1910), Vice President, Medusa (R) Tr. 40067.
Hartley (1925), Sales Manager, South Dakota State Cement Plant (R) Tr. 41502.
Manley, General Manager, Hawkeye (R) Tr. 41631.
Moore, R. W. (1912), Vice President, Dewey (R) Tr. 46899.
Neylan (1900), Asst. General Sales Manager, Lone Star (C) Tr. 6482.

[1] (R) Tr. 23620-21, 23570, 24711.

[2] Resp. Ex. 673 C: Alpha memorandum to dealers, dated 5/25/16.

"A person, firm or corporation regularly carrying in store a stock of Portland Cement for sale to others."[3]

The minutes of a meeting of the Association of American Portland Cement Manufacturers, including a number of respondents herein, on April 14 and 15, 1908, are in part as follows:

"The President: The first subject in order of business is the definition of 'Distributor' and 'Dealer'."[4]

The minutes show that there followed during the course of that meeting a full discussion on that subject. The minutes also show that a resolution was adopted by those in attendance at this meeting providing:

"First: That in order to obtain uniformity, that the word 'Distributor' or 'Jobber' be discontinued and that they be regarded as dealers."[5]

During the course of the same meeting and in the discussion of contracts and dealers the proposition was considered that small dealers be charged 5¢ per barrel more than jobbers so as to protect the jobber from the small dealer.[6]

To a similar effect the minutes of the Association's meetings of December 11 and 12, 1912, May 14 and 15, 1913, and December 10 and 11, 1913, disclose that a number of the respondents herein were then participating in joint discussions concerning the definitions and classifications of dealers and the use of certain contract provisions.[7]

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[3] Com. Ex. 3196; p. 770.

[4] Com. Ex. 3235 Z-15.

[5] Com. Ex. 3235 Z-24-27.

[6] Com. Ex. 3235 Z-31-33.

[7] Com. Exs. 3236 Z-10-11, 3236 Z-24, 3236 Z-25, 3236 Z-44.

When about 1913 Lehigh announced a 5¢ differential on sales to contractors it found that it had to have a definition of a dealer in order to determine who was entitled to the dealer price.[8] The evidence, however, discloses no published definition by Lehigh until its April, 1935 policy statement.[9]

In 1915 The Association of American Portland Cement Manufacturers published a report of its Committee on Trade Conditions recommending the following definition of a dealer:

[Italicized part quoted in Fdgs. Par. Seventeen (b)]

["A dealer is a *merchant, firm or corporation regularly engaged in selling Portland cement and other building materials purchased by him for resale only; who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building-material dealer.*"][10]

This definition was reached by comparing various dealer statements then being circulated. It was part of the statement on trade relations deemed to constitute "the best practices existing in the industry."[11] There is no evidence of agreement to follow it.

At a meeting of the Cement Manufacturers Protective Association on March 20, 1916, the minutes report the suggestion that an attempt be made to get a list of those whom manufacturers considered to be dealers or consumers, but the matter was deferred pending the consideration of the legality of such a step.[12]]

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[8] Bowen, Vice President, Lehigh (R) Tr. 26698-99.

[9] Com. Ex. 2262 A, B.

[10] Com. Ex. 3193, p. 12.

[11] Coogan, Vice President, Alpha (R) Tr. 24710.

[12] Com. Ex. 3234 A-E.

On January 5, 1918, in a pamphlet of general instructions issued to its salesmen, Edison declared:

[Italicized part quoted in Fdgs. Par. Seventeen (b)]

"DEFINITION OF DEALER. *A dealer is a person, firm or corporation regularly engaged in selling Portland cement and other merchandise, especially building materials, purchased by him for resale; who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building material dealer.*

DEFINITION OF A CONSUMER. In the cement business there are two classes of buyers only—dealers and consumers. All consumers should pay consumers' prices. Manufacturers of concrete blocks, cast stone, concrete drain and roofing tile, concrete sinks and laundry tubs, concrete shingles, and manufacturers of all concrete products, railroads, municipalities, State institutions, etc., are consumers."[13]

[In January, 1919 the P.C.A. published a compilation of trade practice reports containing a definition of a dealer identical with Edison's, and the enumeration of other consumers.[14]]

Neither the Institute's Code of Ethics[15] nor its Compendium of Marketing Practices[16] contain a definition of a dealer.

[The NRA Code drafts[17] contained definitions of a dealer and the first printed draft prepared for submission to the NRA on July 19, 1933 provided:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

["*3. Definition of a dealer.—A cement dealer in the Industry is one who has an established place*

[13] Resp. Ex. 2567 C.

[14] Com. Ex. 3192, p. 4.

[15] Com. Ex. 138 N-T.

[16] Com. Ex. 561.

[17] Com. Exs. 556, 637 A-F: Minutes of Meeting of Members, 6/22/33.

of business where he is regularly engaged in selling portland cement and other building materials to the public, with facilities to serve the retail trade in a given territory, and able and willing to perform all functions devolving upon him in securing, performing and protecting contracts for the delivery of portland cement for specific work on his account.

The dealer's compensation shall come from the sale of his materials to his customer, based on services rendered and the cement manufacturer shall not pay a dealer commissions or other remuneration.''][18]

The Code as finally approved in November, 1933 contained the following definition:

"ARTICLE XI

3. *Definition of a dealer.*—A cement dealer as used herein is one who has an established place of business where he is regularly engaged in selling portland cement and other building materials to the public, with facilities to serve the retail trade in a given territory and able and willing to perform all functions devolving upon him in securing, performing, and protecting contracts for the delivery of portland cement for specific work on his account."[19]

This definition was contained in that part of Article XI which was suspended by order of the NRA in January, 1934, about six weeks after the effective date of the Code. The revised draft of Article XI submitted to the NRA contained a definition of a dealer.[20] This proposed revision added to the definition above given that of "promoting the use" of cement. The new code, however, as finally approved in May, 1935 contained no definition of a dealer.[21]

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[18] Com. Ex. 556, p. 14.

[19] Com. Ex. 557.

[20] Com. Ex. 1021 A-F: Letter dated 6/8/34, Rader, Chairman of Code Authority, to Members of the Industry.

[21] Com. Ex. 560.

Between January, 1934 and 1935 dealers and dealer associations proposed definitions.[22] The Cement Code Authority, however, took the position that after the suspension of Article XI it was not interested in who was a dealer.][23]

A definition in substantial agreement with that stated in the Code was published over the initials "McC." in a circular entitled "Cement Trade Practices, revised February 17, 1934" and apparently issued by the Ideal Company to its subsidiary companies.[24]

Hartley, Sales Manager of the non-respondent South Dakota, testifying that the Code definition in Article XI expressed his idea of a dealer said:

> "Q. In your case who decides who is the dealer? A. I do.
>
> Q. Let me call your attention to a Commission exhibit here, 557, page 340, and ask you if the definition set forth there conforms to your ideas as to what properly constitutes the dealer; in your regular practice, I, of course, mean.
>
> • • •
>
> A. That covers it.
>
> • • •
>
> Trial Examiner Norwood: Is that your idea of a dealer?
>
> The Witness: Yes, sir.
>
> Trial Examiner Norwood: Was it before that Code was adopted?
>
> The Witness: In different little language, the same answer.
>
> Trial Examiner Norwood: All right."[25]

While the Cement Code was in effect, three companies in the west published to their salesmen or to the trade, in

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[22] Resp. Ex. 690: Resolution of New England Builders' Supply Association.

[23] Resp. Ex. 181: Letter dated 3/12/34, Rader to Hoenig, Nebraska.

[24] Com. Ex. 947-16 L-16 M, *infra*, pp. 2308-10.

[25] (R) Tr. 41500-02.

connection with statements of their sales policies, definitions of a dealer which conformed in all essential respects with the definition in the Code.[26] Toward the end of the Code period, between April 1935 and May 27, 1935 (the date of the Schechter decision) 24 companies, in announcing their policies to the trade, published definitions of a dealer, all of which, with slight variation in the wording, followed in substance the definition contained in the Code as originally approved.[27] At different times after the in-

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[26] Colorado	2/17/34	Com. Ex. 947-16 M
Pacific	12/27/33	Com. Ex. 954 K
Southwestern	5/ 2/34	Resp. Ex. 3750 A
[27] Aetna	5/22/35	Com. Ex. 90 A
Alpha	4/ 8/35	Resp. Ex. 685
Castalia	4/13/35	Com. Ex. 1935
Consolidated	5/27/35	Resp. Ex. 1769
Diamond	4/11/35	Com. Ex. 1925
Edison	4/ 9/35	Resp. Ex. 2585
Federal	4/10/35	Resp. Ex. 2135 A, B
Hermitage	5/ 6/35	Com. Ex. 813-2 B
Kosmos	4/13/35	Resp. Ex. 2768
Lawrence	4/ 9/35	Com. Ex. 270 J
Lehigh	4/ 6/35	Com. Ex. 2262 B
Lone Star	4/ 9/35	Com. Ex. 89 A, B
	4/9-10/35	Com. Ex. 1165 A, C, D, E, F, G, H, K, L, Q
Medusa	4/10/35	Resp. Ex. 3158 F Com. Ex. 819 X
Monarch	4/30/35	Com. Ex. 2389
National	5/ 2/35	Resp. Ex. 3039 A, B
Nazareth	4/ 8/35	Resp. Ex. 1488
Nebraska	4/25/35	Resp. Ex. 3422
Northwestern States	4/18/35	Com. Ex. 1907
Penn-Dixie	4/10/35	Com. Ex. 1192
Southwestern	4/22/35	Resp. Ex. 1758
Superior	4/15/35	Com. Ex. 1936 Resp. Ex. 1763
Universal Atlas	4/ 9/35	Resp. Ex. 2481
	4/ 9/35	Resp. Ex. 1760
Volunteer	5/ 1/35	Resp. Ex. 2925
Wabash	4/20/35	Resp. Ex. 1767

validation of the Code 9 companies issued policy statements containing definitions of a dealer, each of which was modelled on the Code definition.[28] Also in the spring of 1935 in a circular dated May 25, 1935 and sent by L. I. MacQueen, secretary of the National Federation of Building Supply Assocations, to all secretaries of federated units, this organization distributed a definition of a dealer in building supplies, not specifically mentioning cement, in these terms:

> "A dealer in builders supplies is defined as any person, firm or corporation possessing *warehouse facilities* and other equipment commensurate with the needs of the market which he serves; who maintains an office open to serve the public throughout the entire year, and *who regularly warehouses an adequate line of builders supplies in sufficient quantity and variety to supply the normal needs of his community from his own stock.*"[29]

Following the enactment of the Walsh-Healy Act in June 1936 it became customary for some departments of the Federal Government to include in their invitations to bid a definition of a dealer, as follows:

> "A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other es-

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[28]

Florida	12/20/37	Com. Ex. 331 B
Lehigh	12/13/37	Resp. Ex. 1113
		Com. Ex. 1060
Lone Star	7/23/35	Com. Ex. 2420
	12/27/37	Com. Ex. 1165 R-S
San Antonio	7/20/35	Com. Ex. 2418
Southwestern	7/25/35	Resp. Ex. 2977 B
Trinity	7/22/35	Com. Ex. 2369 A, B
Union	6/23/36	Com. Ex. 736 D
Universal Atlas	7/25/35	Com. Ex. 2265
		Resp. Ex. 2482
Wolverine	12/31/37	Resp. Ex. 2483
	6/ 1/35	Com. Ex. 2412

[29] Com. Ex. 2397 A-C.

tablishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business."[30]

This definition in the main followed that prevailing in the cement industry.

3. Interpretation of Definitions

In the interpretation and application of the definition each manufacturer interpreted and applied whatever definition followed in its own way depending upon its own views and the problems specific to the markets within its selling areas.

Thus a manufacturer would find a number of his competitors selling to persons whom he did not consider to be

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[30] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39168-70.

Com. Ex. 176 C: War Department, U. S. Engineer Office, 9/23/37.

Com. Ex. 122: Department of Interior, Bureau of Reclamation, 6/21/37.

Com. Ex. 3261: Department of Interior, Bureau of Reclamation, 4/9/37.

Resp. Ex. 296: Department of Interior, Bureau of Reclamation, 1/14/37.

Resp. Ex. 344: Department of Interior, Bureau of Reclamation, 3/18/37.

Resp. Ex. 345: Department of Interior, Bureau of Reclamation, 6/30/37.

Resp. Ex. 350: Department of Interior, Bureau of Reclamation, 11/29/37.

Resp. Ex. 777: Navy Department, 5/18/37.

Resp. Ex. 894: War Department, U. S. Engineer Office, 10/1/37.

Resp. Ex. 2307: War Department, U. S. Engineer Office, 2/20/39.

dealers[1] and at times he would sell to individuals who were not solicited by competitors.[2] The manufacturer's application of his own definition changed to meet conditions in markets of various size and the opportunities presented him in each market.[3] The variations in the statements

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[1] Alpha: Coogan, Vice President (R) Tr. 23625-28.
Federal: Bates, J. E., Sales Manager (R) Tr. 30672-74.
Hermitage: McGovern, Sales Manager (R) Tr. 36204.
Resp. Ex. 2677: Letter 7/24/37, McGovern, Sales Manager, Hermitage to W. L. Caughman.
Kosmos: Horner, President (R) Tr. 36961.
Lone Star: Koch, Vice President (R) Tr. 32840.
Missouri: Alexander, President (R) Tr. 37215-16.
Nebraska: Hoenig, Sales Manager (R) Tr. 41963-64.
Petoskey: Lucas, Vice President (R) Tr. 38719.
Southwestern: Warren, G. E., Vice President (R) Tr. 29072.
Blair, W. R., Sales Manager (R) Tr. 38960-61.
Superior: Davis, President (R) Tr. 29599.
West Penn: McKee, Vice President (R) Tr. 27754.

[2] Bessemer: Warren, F. B., Vice President (R) Tr. 32182.
Federal: Bates, J. E., *supra*, Tr. 30672-73.
Hercules: Brobston, President (R) Tr. 26062.
Petoskey: Lucas, *supra*, Tr. 38719.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37708.
Com. Ex. 458 A-C: Letter dated 4/9/35, Southwestern Lumbermen's Assn. to Smith, Penn-Dixie.

[3] Aetna: Calvin, President (R) Tr. 30149.
Bessemer: Warren, F. B., *supra*, Tr. 32183-84.
Federal: Bates, J. E., *supra*, Tr. 30671-72.
Hawkeye: Manley, General Manager (R) Tr. 41629-30.
Hermitage: McGovern, *supra*, Tr. 36202, 36414-15.
Kosmos: Horner, *supra*, Tr. 36819, 36962.
Lone Star: Koch, *supra*, Tr. 32834.
Medusa: Dawson, Vice President (R) Tr. 40067-68.
Missouri: Alexander, *supra*, Tr. 37213-15.
Nazareth: Robeson, Vice President (R) Tr. 28347-48.
Nebraska: Hoenig, *supra*, Tr. 41963-64.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36483.

of witnesses in giving their definition of a dealer show that the concept is flexible as a result of the varying circumstances in different markets.[4]

a. Necessity for Flexibility in Deciding who is a Dealer

Russell, Vice President of Peerless, stated the necessity for flexibility in dealer definition in the following testimony:

> "A. We don't have a strict definition of a dealer.
>
> Q. Would you tell us what you do in selection of a dealer? I mean, the application of your concept of a dealer. A. The application would be made, I believe, in this way, starting with a general definition of a dealer as one who is regularly engaged in the handling of building supply materials, such as bricks, lumber, shingles, plaster, and all materials that go into a building, we would sell to that man if his credit standing was good, if he was the type of man that we figured we could do business with.
>
> He might be one type of a dealer in one location, however. That is, he might conduct an elevator business, in a rural community, whereas in a metropolitan community, he would not conduct the same type of business, so our definition, of necessity, would

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Peerless: Russell, Vice President (R) Tr. 34353-54, 34506-07.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37707-08.
Southwestern: Warren, G. E., Vice President (R) Tr. 29071.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35916-17.

[4] Aetna: Calvin, President (R) Tr. 30149.
Bessemer: Warren, F. B., Vice President (R) Tr. 32185-86.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39857-58.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29528-29.
Hawkeye: Manley, General Manager (R) Tr. 41628-30.
Keystone: Scott, H. M., President (R) Tr. 27490.
Lone Star: Koch, Vice President (R) Tr. 32828-29.
Medusa: Dawson, Vice President (R) Tr. 40067-68.
Monarch: Brooke, Vice President (R) Tr. 42196.
West Penn: McKee, Vice President (R) Tr. 27753-54.
Whitehall: Elliott, Vice President (R) Tr. 28553-55.

be modified, depending on the locality and general type of business in the particular vicinity in which the so-called dealer is located, so that no particular iron-clad rule could be laid down as to who one will accept as a dealer or customer or who one may try to sell."[1]

Thus Calvin, President of Aetna, testifying as to the flexibility in the application of his concept of a dealer, said:

"Q. Do you sell to everyone who represents himself to be a dealer? A. No.

Q. Well, how do you determine to what individuals you would sell? A. Well, we look into the situation and try to decide whether or not it would be a profitable outlet for us—a good distributor, a good dealer, a good connection—a great many things that bear on the situation. His credit is a very vital item right now.

Q. Would you tell us whether or not the requirements that you insist upon of a dealer are the same in cities like Detroit as compared with some small city in the upper peninsular of Michigan? A. No, they are not the same. I explained that the local situation has great bearing on whether or not a person would be a good connection for us.

Q. Now, are there any dealers you find your competitors selling cement to whom you would not sell cement? A. Yes.

Q. Do you sell to any dealers to whom none of your competition sell? A. Yes, sir.

Q. Do you have any fixed definition of what constitutes a dealer? A. No, I have not.

Q. Why don't you? A. Well, I think it is impossible to lay down a fixed rule. It is a matter of personal opinion and judgment."[2]

Koch, Vice President of Lone Star, one of the largest of the chains, testified as to the flexibility of interpretation and application, as follows:

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[1] (R) Tr. 34353-54.

[2] (R) Tr. 30148-49.

"Now, in connection with the definition appearing in your pamphlet to which we have referred, has that definition been applied by your company since the issuance of the pamphlet? A. Oh, as well as you could express it, even before and after the issuance of the pamphlet.

Q. Well, now, do you apply it differently in different sections of the country? A. Yes, you have to place a different interpretation on it, depending upon the locality.

Q. And do you find that conditions in various markets change so that from time to time you have to apply it differently in the same market? A. Correct."[3]

b. Independence of Judgment in Determining who is a Dealer

As to his independence in the application of his concept of a dealer, Horner, President of Kosmos, testified:

"Q. In the stipulation, Mr. Horner, there is a reference to Kosmos' concept of the dealer. In Kosmos applying its idea of a dealer are there any persons who represent themselves to be dealers who buy cement from other manufacturers but to whom you do not sell cement? A. There are such cases.

Trial Examiner Norwood: Is that because you do not regard them as dealers?

The Witness: Usually because we do not think they are qualified to perform dealers' duties.

By Mr. Withrow:

Q. Do you have any agreement with your competitors as to what companies are dealers and what companies are not dealers? A. No, we have not. We determine that for ourselves.

Q. Do you have any agreements with dealers' associations on that question? A. We have not.

Q. And in determining whether or not some company is a dealer, do you take into consideration the

[3] (R) Tr. 32834.

fact that he is a member of a dealers' association? A. We would not know whether he was or not except by accident.

Q. Did you ever refuse to sell to a dealer because a building supply dealers' association requested you not to sell? A. I feel sure we have not.

Q. Now, what part, if any, do your salesmen take in determining whether or not some company should be sold as a dealer by the Kosmos Company? A. Well, the salesman's report on a dealer or a proposed dealer naturally has a good deal to do with our decision. We may check that report if we see fit.

Q. Does the interpretation and application of your concept of a dealer vary at different points in your territory? A. Yes, it does. The larger the city or town the more we would expect a dealer to confine himself just to building supplies. When you get into a very small place a dealer may also be a hardware merchant, or a lumber yard, or something of that nature."[1]

Coogan, Vice President of Alpha, testified that that company had approximately 3,000 dealers and a dealer definition which it had followed since 1903 but that its application "is entirely flexible and we make our own interpretation in each individual case where the question might arise."[2]

The stipulation of Nebraska fairly summarizes the problem of interpretation and application of the definition of a dealer.

"14. Nebraska has no rigid or arbitrary standard by which it determines whether or not it will sell a particular person as a dealer. Whether or not a person will be sold as a dealer depends on the circumstances of the particular case. Generally speaking, Nebraska considers that a dealer must be in a position to finance and handle carload business. He

[1] (R) Tr. 36961-62.

[2] (R) Tr. 23625, *supra*, p. 2257 *et seq.*

must have warehousing and retailing facilities for the volume of business he could be expected to handle, and must handle a sufficient variety of other building materials to place him in the class of a retail merchant of building materials. The size and character of the area in which the prospective dealer is located has much to do with the type of facilities and services that Nebraska would require.

15. With respect to the territory in which it markets cement, Nebraska has found that it solicits and sells some customers as dealers whom its competitors do not solicit; that its competitors sell to some persons as dealers whom it does not consider to be dealers and therefore does not solicit as such; and that there are some persons whom both Nebraska and its competitors sell, so far as Nebraska is concerned at least, as dealers. Nebraska has never had any agreement or understanding with its competitors or anyone else with regard to whether any particular person should or should not be sold as a dealer.'"[3]

Elcock, Vice President of Southern States, one of the smaller companies, took the opportunist view of the definition of dealer and testified:

"Q. What are the factors which your company stresses in the selection of its dealers? A. If he looks like a dealer and has a little money we will sell him.

Q. Do you have any requirement that he shall handle a full line of building materials? A. Well, we had that in our minds, but we do not use it very much.

Q. What has been your experience as to whether or not competitors' companies sell to persons whom you do not consider dealers? A. My experience has been they will sell to anybody who even looks like one.

Q. To what extent, if any, has the Southern States Company been influenced in the selection of its dealers by the fact that some competitors have or have not treated them as dealers? A. We do not pay any attention whatsoever to what they do or what they think.

[3] Hoenig, Sales Manager (R) Tr. 41963-64.

Q. Has it made any difference to your company in the selection of its dealers whether or not the concern is a member of some dealer or building supply associations? A. It does not make the slightest bit of difference to us."[4]

Davis, President of Superior, testified:

"Q. Would you tell us, if you know, whether or not any of your competitors sell to persons whom you won't sell as a dealer? A. Well, of course, I do not know definitely; I know that people we would not sell as a dealer gets cement from some place other than us.

Trial Examiner Norwood: What do you do in a case like that, then? Do you meet the competition by selling this person?

The Witness: Well, there are a good many reasons for not selling a dealer, if your Honor please. One might be for credit reasons. Another might be because we do not consider him equipped sufficiently to take care of the trade in that community, such as we feel he should do. If we do not take on a dealer we do not take him on just because somebody else does. If we refuse to sell a dealer we just do not sell him.

By Mr. Withrow:

Q. And the fact of whether or not a competitor sells him would not make any difference? A. That has no bearing on it at all."[5]

Hanahan, President of Volunteer, disposed of the question of definition in the simplest statement of the dealer's credit and facilities. He testified:

"Q. Well, do you select your dealers in accordance with any particular qualifications? A. No. We are glad to get one, if he has credit and has the

[4] (R) Tr. 37528-29.

[5] (R) Tr. 29599-600.

facilities for serving the trade. He cannot be too small, and he cannot be too large for us."[6]

Salesmen were given wide discretion in determining upon dealers.[7] Some companies investigate the qualifications of a prospective dealer with care.[8] Thus, Peerless

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[6] (R) Tr. 38640-41.

[7] Bessemer: Warren, F. B., Vice President (R) Tr. 32181-82.
Kosmos: Horner, President (R) Tr. 36962.
Missouri: Alexander, President (R) Tr. 37215.
Whitehall: Elliott, Vice President (R) Tr. 28554-55.

[8] Aetna: Calvin, President (R) Tr. 30148-49, 30162-63.
Resp. Ex. 2038: Letter 8/24/38, Riley Elevator Co. to Aetna.
Resp. Ex. 2039: Interoffice Memo 8/26/38, De Golia of Aetna to Renwick.
Resp. Ex. 2042: Letter 8/31/38, Lyon Milling Co. to Aetna.
Resp. Ex. 2043: Interoffice Memo 9/2/38, De Golia of Aetna to Sherry.
Resp. Ex. 2040: Letter 9/3/38, Tom Nichols to Aetna.
Resp. Ex. 2041: Interoffice Memo 9/6/38, De Golia of Aetna to Renwick.
Resp. Ex. 2044: Interoffice Memo 9/7/38, De Golia, Aetna to Hiscox.
Resp. Ex. 2036: Letter 7/24/39, W. A. Darling & Sons to Aetna.
Resp. Ex. 2037: Letter 7/26/39, De Golia, Aetna to W. A. Darling & Sons.
Federal: Bates, J. E., Sales Manager (R) Tr. 30685-86.
Hawkeye: Manley, General Manager (R) Tr. 41630-31.
Hercules: Brobston, President (R) Tr. 26055-62, 26432-34.
Hermitage: McGovern, Sales Manager (R) Tr. 36202-04, 36231.
Resp. Ex. 2675: Letter 4/4/36, Hermitage to Morgan's Inc.
Resp. Ex. 2676: Letter 4/1/36, Morgan's Inc. to Hermitage.
Kosmos: Horner, *supra*, Tr. 36818-19, 36962.
Medusa: Dawson, Vice President (R) Tr. 40067.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36483, 36485.
Peerless: Russell, Vice President (R) Tr. 34349-50, 34504-05.
Resp. Ex. 2442 A-E: Peerless Credit Check-up on Dieterman Bros., June 1939.

provided a form for its salesmen to fill out answering questions concerning the qualifications of prospective dealers.[9] Boice, Sales Manager of Universal Atlas, wrote to a salesman of the company that before opening a new dealer account "we like to talk to at least a number of the best recognized dealers in the town to find their reaction as to whether or not the proposed concern is a recognized dealer in cement."[10] Reiter, Vice President of Universal Atlas, stated that the decision of Universal Atlas as to who were dealers meeting with its definition was made by the company and no one else.[11]

Most companies were not influenced in the determination of who was a dealer by whether or not he was sold by

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Resp. Ex. 2443 A-C: Peerless Credit Check-up on U. S. Lumber Co., April 1939.

Resp. Ex. 2444 A, B: Peerless Credit Check-up on Spears Lumber Co., April 1939.

Resp. Ex. 2445 A, B: Peerless Credit Check-up on Quality Materials Co., September 1938.

Resp. Ex. 2446 A, B: Peerless Credit Check-up on U. S. Lumber Co., April 1939.

Resp. Ex. 2447 A-D: Peerless Credit Check-up on Friendship Plaster & Bldg. Supplies, January 1939.

Resp. Ex. 2448 A-C: Peerless Credit Check-up on Friendship Plaster & Bldg. Supplies, October 1937.

Petoskey: Lucas, Vice President (R) Tr. 38754-55.

Pittsburgh: Letzkus, Sales Manager (R) Tr. 37707.

Southwestern: Warren, G. E., Vice President (R) Tr. 29070.

West Penn: McKee, Vice President (R) Tr. 7908-09.

Whitehall: Elliott, Vice President (R) Tr. 28555.

Wolverine: Nelson, J. L., Vice President (R) Tr. 35916.

Lehigh: Resp. Ex. 1112: Lehigh prospective dealer card.

[9] Peerless: Russell, Vice President (R) Tr. 34349-50. Resp. Ex. 2442 B.

[10] Com. Ex. 1937: Interoffice memo dated 7/3/37.

[11] (C) Tr. 4208-10.

other companies.[12] One company has as a dealer a drug-store,[13] and another a florist.[14] There has never been a rigid rule as to who is a dealer,[15] and the dealer class today is the result of an evolution of over thirty years.[16]

The stipulation of Southwestern (El Paso) emphasizing the merit of confining dealer sales to proper dealers stated the policy of definition and its application as follows:

> "(65) In applying these qualifications to an individual dealer, El Paso has no rigid rule. We believe that so long as a dealer can satisfy the requirements of his particular community, he will be considered a dealer for our company purposes. In determining whether a given dealer can satisfy the

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[12] Alpha: Coogan, Vice President (R) Tr. 23625-27.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39858.
Dewey: Moore, R. W., Vice President (R) Tr. 46900.
Federal: Bates, J. E., Sales Manager (R) Tr. 30672-74.
Hawkeye: Manley, General Manager, (R) Tr. 41630.
Hermitage: McGovern, Sales Manager (R) Tr. 36205-06.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6491.
Missouri: Alexander, President (R) Tr. 37215-16.
National: Dannelly, Vice President (R) Tr. 39552.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36484.
Peerless: Russell, Vice President (R) Tr. 34353-54.
Whitehall: Elliott, Vice President (R) Tr. 28556-57.

[13] Hermitage: McGovern, *supra*, Tr. 36415.

[14] Alpha: Coogan, *supra*, Tr. 23626.

[15] Hawkeye: Manley, *supra*, Tr. 41629-30.
Missouri: Alexander, *supra*, Tr. 37215.
Monarch: Brooke, Vice President (R) Tr. 42196, 42332-33, 42414.
Nazareth: Robeson, Vice President (R) Tr. 28347-48.
Nebraska: Hoenig, Sales Manager (R) Tr. 41963.
Southern States: Elcock, Vice President (R) Tr. 37528.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38960-61.
Volunteer: Hanahan, President (R) Tr. 38640-41.

[16] Alpha: Coogan, *supra*, Tr. 23614.

requirements of his particular community, El Paso salesmen investigate the man's facilities, his ability to serve his market, his reputation and integrity, and his financial status. We usually check his credit ratings and his financial status in the El Paso office, if we can, as a cross-check on the report of our salesmen. During my experience with the El Paso mill, I have found that our competitors sell to persons whom we do not consider qualified to serve their community or whom we do not consider good credit risks.

(66) Although at El Paso we have had a rather clear conception of a dealer for many years, I do not recall seeing a written definition until the NRA Code was published. Throughout my experience with the company, our concept of a dealer has not changed. When the NRA Code appeared, it included a definition of a dealer in simple, concise language. In announcements which our company has sent out since this Code appeared, we have incorporated substantially the definition of a dealer which appeared in the Code of Fair Competition because it seemed to me to be the clearest statement that I had seen of the concept which we had had at the El Paso mill for many years."[17]

4. Denials of Agreement as to who are Dealers

By 1935 Aetna was the only company selling cement to distributors and this practice appears to have met with some criticism. Cree, Sales Manager of Aetna, writing to Lingemann, General Manager, on May 20, 1935, referring to their distributor, wrote:

"As far as this Mr. Smith is concerned—as I said before, he is a very high type of business man. He is very influential, has numerous friends, and is financially sound. I might say, however, that he is very much surprised to realize that our competitors have had so many detectives following his opera-

[17] (R) Tr. 38960-61.

tions, and it is very pleasing for us to realize that they have never been able to find anything really irregular about his distribution. He is also disappointed to hear stories from some of his old acquaintances, which stories are to the effect that certain cement Companies have temporarily located themselves there to compete with him for the main purpose of attempting to drive him backward."[1]

However, executives of many respondents denied that there is any agreement among the manufacturers as to what particular persons are qualified as dealers[2] and the wit-

[1] Com. Ex. 28 C.

[2] Bessemer: Warren, F. B., Vice President (R) Tr. 32182, 32185.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39858.
Dewey: Moore, R. W., Vice President (R) Tr. 46902.
Edison: Sweeney, Vice President (R) Tr. 35724.
Federal: Bates, J. E., Sales Manager (R) Tr. 30672-74.
Georgia: (R) Tr. 48101 (adopting Tr. 37215-16).
Giant: (R) Tr. 48103-04 (adopting Tr. 37215-16).
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29530.
Hawkeye: Manley, General Manager (R) Tr. 41630-31.
Hermitage: McGovern, Sales Manager (R) Tr. 36232.
Keystone: Scott, H. M., President (R) Tr. 27490-91.
Kosmos: Horner, President (R) Tr. 36961.
Lone Star: Koch, Vice President (R) Tr. 32841.
Neylan, Asst. General Sales Manager (C) Tr. 6655-56.
Hogan, President (R) Tr. 34560.
Medusa: MacFarland, Vice President (R) Tr. 31049.
Missouri: Alexander, President (R) Tr. 37215-16.
Monarch: Brooke, Vice President (R) Tr. 42832.
Nebraska: Hoenig, Sales Manager (R) Tr. 41963-64.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36484.
Oklahoma: Thompson, Sales Manager (R) Tr. 46564.
Peerless: Russell, Vice President (R) Tr. 34355.
Petoskey: Lucas, Vice President (R) Tr. 38719.
Southern States: Elcock, Vice President (R) Tr. 37529-30.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 39304.
Standard: (R) Tr. 48105-06 (adopting Tr. 37215-16).
Superior: Davis, President (R) Tr. 29601.

nesses testified that the Institute never dictated the definition of a dealer or undertook to determine for any manufacturer who was a dealer.[3]

5. The Dealers' Interest in the Definition

As to the interest of building material dealers in restricting sales of cement by the manufacturers to building supply dealers who are on a competitive basis with one another, McCracken, Manager of the American Builders Supply Company of Louisville, Kentucky, testified:

> "Q. Now, have you ever objected to any manufacturer because he was making sales to companies which you did not believe were building supply dealers? A. Yes, we have discussed it with different manufacturers at different times on different people, that we felt a certain person who was not a dealer, that he was simply coming into the market and gaining some advantage on one particular job, and would go out of the business, and he was simply taking our business away from us when he was not really going to stay in the business."[1]

Utah: (R) Tr. 48105 (adopting Tr. 37215-16).
Volunteer: Hanahan, President (R) Tr. 38640.
Vulcanite: (R) Tr. 49106-07 (adopting Tr. 37215-16).
West Penn: McKee, Vice President (R) Tr. 27898-99, 27901.
Whitehall: Elliott, Vice President (R) Tr. 28555.
Wolverine: Nelson, Vice President (R) Tr. 35992.

[3] Georgia: (R) Tr. 48101 (adopting Tr. 26208, 37217).
Giant: (R) Tr. 48103-04 (adopting Tr. 26208, 37217).
Hercules: Brobston, President (R) Tr. 26062.
Keystone: Scott, H. M., President (R) Tr. 27492.
Missouri: Alexander, President (R) Tr. 37217.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36484.
Standard: (R) Tr. 48105-06 (adopting Tr. 37217).
Utah: (R) Tr. 48105 (adopting Tr. 37217).
Vulcanite: (R) Tr. 48106-07 (adopting Tr. 26208, 37217).
Whitehall: Elliott, Vice President (R) Tr. 28558.

[1] (R) Tr. 36747-48.

C. Classification of Dealers' Trade and Direct Sales.

The Complaint alleges that in spite of an unsuccessful effort to maintain in the Code of Fair Competition a classification of customers to whom cement producers might sell direct and those to whom they were prohibited from selling direct, the respondents, nevertheless, arbitrarily and cooperatively made such classification and division of customers and have combined to limit their sales to middlemen to those who fall within the agreed and arbitrary definition of cement dealer with the exception of certain specific classes arbitrarily selected who, though not dealers, may purchase cement from the manufacturers.[1]

1. Necessity for Classification

For more than twenty-five years prior to the issuance of the Complaint, manufacturers sold their product to dealers, to large users such as the railroads, contractors on certain types of jobs and to the governments, state and federal. Classification of various users and the distinction between them and dealers arose as a necessary means of distinguishing trade which the manufacturer felt could best be served by the dealer and that which he felt would best be served by direct sales.

2. Vagaries of Classification: 1913-1933

Coogan, Vice President of Alpha discussing the practice of classification, at least since 1915, testified:

> "A. We confine our sales to dealers except for certain classes of customers and for certain specified work.
>
> Q. How long have you done that? A. Well, we have done that more or less for a great many years. It goes back almost to the start, to my start in the.

[1] Complaint, paragraphs 7(e), (f).

business, in one form or another. Well, it differed over the years, of course.

Q. Well now, is the division of work which you would sell direct, and which you would sell dealers the same as it was since 1915, and has it been the same all of the time since 1915? A. Oh, no. There has been a decided change from time to time. There is much more work sold direct now than there was in 1915.

There has been a decided increase, of course, that is partly brought about by the fact that there are more large jobs and more jobs on which, perhaps, the dealer does not perform the service, or where we have increased our classifications of those jobs, and there is much more direct selling to do in them than there ever has been.

Q. Would you say that your policy in that regard has been definite at any one time, or have you had different methods in operation at the same time, Mr. Coogan? A. Oh, I see. Well, during certain parts of our experience we have had different methods at the same time, but as it stands at the present time we are using—pretty well using one method. As a matter of fact, it would be quite difficult to put down or have two methods working concurrently.

Q. That is what I meant by my question; whether you had two methods in operation at the same time, or whether you would use one method and then use another later on. A. If you put in one method and use it for a year or as long as you feel like it, you can not very well at the same time be trying any other method.

As I have stated before, it is largely a matter of trial and error, and it has been worked out as to what is the best means of marketing cement."[1]

In March 1916 Coogan directed his salesmen to discontinue selling block manufacturers either direct or through dealers for annual requirements and to hold their orders to commitments for fifteen days delivery.[2]

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[1] (R) Tr. 23566-68.

[2] Resp. Ex. 674.

Two months later Coogan notified the salesmen classifying purchasers as those who were ready to take cement immediately and those who were not in such a position, and they were to be quoted differently. He goes on to say that "We have but two classes of trade—dealer and consumer" and gives instruction for recognition of the difference.[3]

Again in 1918 in instructions to the sales department, Coogan distinguishes sales "direct or through dealers covering the requirements of Industrial or Concrete Product Plans, Municipal, County or State requirements" and directing that cement for such needs be sold either for fifteen days shipment or for a definable specific job, "the same as we sell to all other classes of trade."[4]

He goes on to state that the practice to be abandoned, namely contracts to fill their requirements for a long period of time, generally a year, discriminated in favor of a certain class of consumers. There is here in this same communication therefore the idea of classes of sales and classes of consumers and the distinction is not clear.[5]

In 1925 the general sales manager of Alpha wrote the salesmen that the company's dealers had criticized it for selling state institutions at the same price at which it sold its dealers and stated that "because of our policy of cooperation with the dealer to the fullest possible extent, we have determined to meet their views in this matter." They are then directed to quote state institutions the consumer's price and adds, "We will continue quoting the Federal Government, the Railroads and State Highway Departments, the same price as we would quote a dealer."[6]

Here is the idea of a different price for a consumer whose use of the cement is regarded as placing his pur-

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[3] Resp. Ex. 673.

[4] Resp. Ex. 527.

[5] Resp. Ex. 527.

[6] Resp. Ex. 675.

chase in competition with sales generally made by dealers, while sales to other users are not regarded as in competition with sales made by dealers. In 1927 the general sales manager of Alpha instructed the salesmen:

> "Please be advised that effective this date, we have changed our sales policy in the following respects:
>
> In future, railroads will be quoted on the same basis as a dealer.
>
> Contractors on state or county highway projects may be quoted on the same basis as a dealer, providing such action on our part will not conflict with established Alpha dealer.
>
> Concrete products plants and block makers may also be quoted on the same basis as a dealer, providing such action will not conflict with established Alpha dealer.
>
> Hydro-electric plants may be quoted on the same basis as a dealer, providing it will not conflict with our present dealer relations."[7]

The salesmen were then admonished to be careful not to make sales under the above instructions "where it may conflict with established Alpha dealer."

Within one week Alpha found it necessary to withdraw these instructions of November 18, 1927,[8] because as Coogan testified, the proposed changes "were transmitted to a good many customers by our field men and we got unfavorable reactions on them, and that unfavorable reaction was large enough so that under date of November 25, notwithstanding that some of the companies had used the policies outlined in the letter of November 18, we withdrew our instructions * * * and reverted to the policy we had in effect prior to November 18."[9]

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[7] Resp. Ex. 676.

[8] Resp. Ex. 677.

[9] (R) Tr. 23577.

Explaining the reason for classification as it applied to the distinction between railroads and dealers, Coogan referring to the announcement of November 18, 1927 testified:

> "Prior to this announcement we had been attempting to sell the railroads on the same basis that we were selling other consumers. We had many complaints about it. I, personally, had a talk with the purchasing agent of one large railroad company and he explained to me their difficulties; the fact that we were quoting them our consumer price, and in some cases when they wanted to buy cement at a particular destination he was able to get the dealer at that particular destination to cut his differential, and buy it cheaper than we were selling it to him. I do not think they had any desire to buy it that way, but nevertheless they wanted their records clear so that they could prove that they bought at the lowest price and that, in connection with the unsatisfactory method of considering them 'consumers' led us to, at that time, change over and quote them under our dealers' price."[10]

As to sales to concrete products plants and the reason for making a change in Alpha's classification in 1927, Coogan testified:

> "A. Yes, prior to that time we sold them through the dealer. It was our opinion that there should have been some change in there because a good many dealers were competing with by putting in block plants and they were buying their cement as dealers and the fellow who was running an independent block plant was not able to buy on the same basis. That was the reason we felt some change should be made in the handling of that type of business.
>
> Q. Would you say that was or was not the regular policy to sell in that way during that time? A. Well, prior to that time we had sold them all through dealers.

[10] (R) Tr. 23580.

Q. That was your policy at that time? A. There, again, there is a qualification in there which means that that policy at that time might operate in some case and might not operate in another case."[11]

On November 7, 1931 Bragg, the Eastern Sales Manager of Alpha, addressed his salesmen drawing attention to an "increasing tendency toward direct sales: manufacturer to consumer." He then detailed this tendency and indicated the desire of Alpha to resist it and the feeling of the company that they must follow the tendency in order to participate in the business. His letter continues:

"During the past year, since the general abandonment of dealer service payments,[12] all manufacturers have sold certain classes of work direct. There has been an attempt to confine these direct sales to United States Government, State and County Governments, Railroads, Hydro-Electric Plants and contractors doing such classes of work. However, the practice is rapidly being extended to other classes of users so that at the present time concrete products manufacturers, ready mix or transit mix companies generally and certain large projects located at points where dealer service is not involved are being gradually included among those listed above.

The Alpha Company has always been a dealer company and it is our purpose to continue our policy of cooperation with the retail dealer. However, we believe that to participate in the sales of our product, the dealer should perform certain definite services such as handling, warehousing and financial responsibility, including the assumption of credit risks, collections, etc. We do not want to do anything to break down business now controlled by large retail dealers but we do believe our policy should be sufficiently flexible to permit of direct sales to the classes of work and users mentioned above.

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[11] (R) Tr. 23582-83.

[12] A plan initiated by Lehigh and opposed by dealers, *infra*, p. 2459 *et seq.*

Therefore, in order to make us competitive, we will, so far as possible, carry out the policies outlined above. In all cases where, in your opinion, such procedure will not be detrimental to the best interests of the Alpha Portland Cement Company, you are at liberty to quote the above mentioned classes of work our dealer price. In case you have a situation where there is any doubt in your mind as to the advisability of quoting direct, please get in touch with your district manager who will give you the proper instructions.

This gradual change in marketing procedure carries with it an increased responsibility which you must assume. It is absolutely essential that you increase and improve your acquaintance among the users of Portland Cement. You must broaden your activities to cover the acquisition of new friends among engineers, architects, contractors, public officials, concrete products manufacturers, ready mix operators, etc. Do not make the mistake of minimizing the importance of this phase of your work. Your sales success will be in proportion to your ability to adjust yourself to these and future changes."[13]

Coogan was asked whether his competitors published policy announcements to the trade prior to the time when this last instruction was issued to Alpha's salesmen and whether Alpha received copies of them sent in by Alpha's dealers. Coogan answered:

"A. Well, I am sure that if they were in the field that our dealers sent in some of them, as they always do. If they were sent out in the field by our competitors there is not the slightest doubt in my mind but what our dealers and our fieldmen sent them in. They always do that."[14]

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[13] Resp. Ex. 678.

[14] (R) Tr. 23587.

Coogan then identified an announcement of Edison's sales policy, dated February 18, 1931,[15] an announcement by Lawrence, dated February 21, 1931,[16] an announcement by Giant, dated February 21, 1931,[17] an announcement by Vulcanite, dated February 24, 1931,[18] an announcement by Universal Atlas, dated March 6, 1931,[19] and an announcement by Penn-Dixie.[20]

Coogan testified that these were all taken from the files of Alpha, and concerning them Coogan testified:

> "A. Some of these bear notations as to the source from which it came. Taking them in order, one is from our Boston office; one is from Mr. Santee, one of our district managers; another one is from Mr. Santee, one of our district managers; one is from our Syracuse, N. Y., salesmen; and the other one bears no notation.
>
> Q. Did you, from these exhibits which you have mentioned, gain information as to the work that the companies mentioned would sell direct and the kinds of work that they would sell through dealers? A. Yes, these are announcements of the sales policies of these various companies. According to our reports from the dealer and the field at that time, there were some other companies that had made announcements, but these are all the announcements that I was able to pick up from our records."[21]

There were in evidence other announcements of policy issued at approximately the same time, and each of them

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[15] Resp. Ex. 679.

[16] Resp. Ex. 680.

[17] Resp. Ex. 681.

[18] Resp. Ex. 682.

[19] Resp. Exs. 683, 2479.

[20] Resp. Ex. 684.

[21] (R) Tr. 23589.

advised the dealer the types of business and users to whom the manufacturer would sell direct.[22]

All of these announcements issued within six weeks of one another were induced by the breakdown of the so-called Lehigh Dealers Service Plan.[23] In evidence are many requests by dealers to one manufacturer to issue a statement of policy.[24]

All of the witnesses examined upon this subject of classification testified to the nature of the problem, as it faced the manufacturers, in terms similar to the testimony as to Alpha set forth above.

Brobston, President of Hercules, being examined as to whether that company pursued any definite plan of classification and the reason for it, if any, testified:

> "Q. Let me put it this way: In 1915 I think you started, then, with your experience in selling. I am trying to find out whether in 1915, and the years following, were you following any plan of classification of business? A. Well, we sold to dealers and to consumers. I think I have outlined what I thought a dealer was, and, as I say, we sold to some large contractors. We sold the Government direct and we

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[22] Resp. Ex. 653: Medusa Announcement, Feb. 17, 1931
Resp. Ex. 651: Bessemer " Feb. 20, 1931
Resp. Ex. 657: Nazareth " Feb. 21, 1931
Resp. Ex. 2449 G: Peerless " Feb. 25, 1931
Resp. Ex. 662: Pittsburgh " Mar. 2, 1931
Resp. Ex. 663: Glens Falls " Mar. 2, 1931
Resp. Ex. 2952: Petoskey " Mar. 2, 1931
Resp. Ex. 670: Lone Star " Mar. 16, 1931
Resp. Ex. 669: Lehigh " Mar. 16, 1931

[23] *Infra*, p. 2459 *et seq.*

[24] Resp. Ex. 1485: Building Material Men's Association of Westchester County to Nazareth, Feb. 3, 1931.
Resp. Ex. 1486 A-C: New England Builders' Supply Association to Nazareth, Feb. 10, 12, 1931.
Resp. Ex. 1487: Camden Lime Company to Nazareth, Feb. 19, 1931.

sold the railroads direct, and, as I mentioned before, later on we sold to State Governments and to contractors for State work.

Q. Then you sold some customers direct. What was your purpose in selling some customers direct? A. Well, the main purpose in selling some customers direct was because we couldn't get the business if we didn't because other companies were selling them direct, and we would have lost the business and the customers on those occasions.

Q. Any other reasons? A. I think that is a good and sufficient reason. I don't know; I should think that would cover everything. It was a case of losing money and losing business if we didn't sell these people direct.

Q. This work that you did sell direct, was the work readily serviceable by dealers? A. Oh, no, no. It was work that a dealer couldn't readily service or we would have sold the dealer.

Q. And did these classes of customers have the facilities necessary for handling the cement at the points of use, Mr. Brobston? A. Yes. That was the real reason they were sold direct."[25]

Bowen, Vice President of Lehigh, testifying as to the earlier experience of classification made by that company, stated:

"A. The first policy we adopted was in the early part of 1913, at which time, in a great many territories, we adopted the method of selling direct to contractors on all jobs requiring over 7,500 barrels, while jobs requiring less than 7,500 barrels were sold only through dealers.[26]

* * *

Q. Well, what happened, then, with respect to this first quantity limitation, in solving your market problem? A. It was not particularly successful. There were a good many cases in which contractors

[25] (R) Tr. 26066-67.

[26] (R) Tr. 26689.

having jobs requiring, say, 5,000 barrels represented that the job required 7,500 barrels; whereupon, we sold it direct. When that happened the dealer involved accused us of having made the transaction knowingly, and thereby violating our promise to him to observe the policy about which we had told him.

Q. Well, did you take any steps to remedy that condition, Mr. Bowen? A. Later on, in 1913, we increased the quantity to 15,000 barrels; that is, we sold direct only jobs that required 15,000 barrels. We took that step because we thought that 15,000-barrel jobs would be so few that they could readily be checked, and that the difficulties that we had had with the 7,500-barrel figure would be eliminated; but that did not prove a great deal more sucecssful.[27]

* * *

Q. I see. Well, Mr. Bowen, did you have that same policy with respect to the sales to the United States Government? A. No, the United States Government was always sold direct at the same price that we sold the dealers.

Q. What about the railroads? A. The same condition applies to railroads. The United States Government, State Governments, and railroads have always been considered in a class by themselves; in a class which we do not attempt to give the dealer protection.[28]

* * *

Q. Well, will you tell us more about that? What was the policy which you put into effect in the latter part of 1914? A. The first step in that definite policy occurred late in 1914 when we adopted the policy, first in New England, of selling all jobs requiring less than 5,000 barrels only through dealers. We notified all the dealers in New England about this policy; committed ourselves to its observance.

The dealers liked it, applauded us for it, and gave us a lot of business as a result of it.

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[27] (R) Tr. 26690-91.

[28] (R) Tr. 26693.

Q. Do you recall, now, whether your competitors followed in adopting this policy in the latter part of 1914? A. No, there was no great display of following that policy on the part of competitors. The policy, in a large measure, tied our own hands, and most of our competitors seemed to be content to sit on the sidelines and see how the policy might work out.

Q. What, if anything, did you do next, then, with respect to developing your policy? A. The successful operation of the policy, so far as its effect in our business was concerned, encouraged us to take further steps, and we then increased the minimum quantities, the successful increases being, as I recall it, to 10,000 and 15,000 barrels.

Q. What happened with respect to that; this policy of dealer protection? What happened then? A. The changes in policy were equally successful so far as helping us to build up our dealer business and the result encouraged us to take a still further step, which we did in the early part of 1915.

Q. What was that? A. That step was to make a definite announcement that throughout the entire territory in which we did business our prices to contractors would be 5 cents per barrel higher than our prices to dealers, irrespective of quantity.

Q. How did that work out, Mr. Bowen, as far as your dealers are concerned?[29]

* * *

A. The policy was very acceptable to the dealers."[30]

3. Portland Cement Association Recommended Classification

[The 1915 Report of the Trade Conditions Committee of the Association of American Portland Cement Manufacturers distinguished cement buyers in two classes, dealers

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[29] (R) Tr. 26694-96.

[30] (R) Tr. 26697.

and consumers,[1] and in 1919 the Trade Practices Committee of the Portland Cement Association published recommendations concerning direct sales and maintenance of a price differential between dealer and consumer. The recommendations contain the following provision:

> "It is recommended that sales to classes of purchasers referred to in this section should be made direct preferably; that where such sales are made through dealers, except in the case of railroads (where it is preferable that all sales be made direct) it is important that cement companies check up such cases carefully to prevent possibility of cement ordered by dealers on such contracts being sold through dealers and used for other purposes, contrary to contracts."][2]

4. Institute Ignores Classification

When The Cement Institute was organized in 1929, the Code of Ethics prepared in contemplation of a Trade Practice Conference with the Federal Trade Commission contained no provision concerning the classification of customers or trade.[1] At that time the National Builders' Supply Association wrote to the Institute inviting attention to certain "unethical practices indulged in by some cement manufacturers, which we believe should be covered in these Trade Practice Rules" and after listing some seven objectionable practices, added "The dealer will appreciate a uniform practice by the manufacturers; a practice that will give the dealer an equal chance in competition."[2]

The Institute replied stating that the opportunity to give careful consideration to the matter might develop in

[1] Com. Ex. 3193.

[2] Com. Ex. 3192, p. 15.

[1] Com. Ex. 138.

[2] Com. Ex. 150: National Builders' Supply Association to the Cement Institute, Feb. 7, 1930.

the course of the Trade Practice Conference.[3] However, the minutes of members' meetings and of trustees' meetings indicate that the subject of classification was presented for consideration but no action in any form was taken.[4]

During the business depression and from the period of these announcements early in 1931 to the adoption of the NRA Code, there was a trend to sell more cement direct and to sell through dealers only when they could render some service.[5]

5. NRA Code on Classification: Article XI

[When the NRA Code was in the drafting stage and before the districts for consideration, the minutes of the meeting of Districts 1 and 2, held on June 22, 1933, contained the following proposal from which Article XI of the approved code dealing with classification finally evolved:

> "Mr. Hogan moved that the Board be recommended to insert as the first paragraphs of Article VI—Methods of Marketing and Sale of Cement—the following:
>
> (A) All portland cement will be marketed in each community only to or through the recognized established building material dealer, or dealers, regularly serving such community. This applies to all classes of buyers except as in Paragraph B. Importers, brokers and so-called distributors will be considered as competitors.

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[3] Com. Ex. 149.

[4] Com. Ex. 136 X: Minutes of Members' Meeting, Dec. 13, 1929.
Com. Ex. 136 PP: Minutes of Trustees' Meeting, Jan. 24, 1930.
Com. Ex. 136 SS: Minutes of Trustees' Meeting, Mar. 14, 1930.

[5] Bowen, Vice President, Lehigh (R) Tr. 26707-09.
Robeson, Vice President, Nazareth (R) Tr. 28248, 28459, 28462-64.
Calvin, President, Aetna (R) Tr. 30163-64.
Warren, F. B., Vice President, Bessemer (R) Tr. 32416.

(B) The following classes of business may be sold direct by a manufacturer and at the same price and under the same terms and conditions of sale as dealers, except as provided in paragraph 3 on pages 6 and 7 hereof.

United States Government.

Railroads filing tariffs with State or Interstate Commissions, including Terminal Railroads.

State Government, counties or agencies thereof, when properly authorized to purchase cement for public improvements or maintenance.

State Government and county work financed by and under the direction of officials of such Government branches.

Large hydro-electric projects outside city limits.

Contractors doing any of the foregoing classes of work located outside cities and towns and not requiring dealer service.

Concrete product manufacturers, including block, tile, roofing, pipe, piling and all other precast concrete units, when for their own manufacturing operations but not for re-sale.

Central mixing plants for their own processing operations but not for re-sale."[1]

When the first draft of the proposed NRA Code was before the companies for consideration, Shelby, Vice President of Calaveras, wired to Koch of Lone Star stating that the proposal apparently required cement to be sold at the same price both to dealers and consumers except on retail quantities, requesting Koch's interpretation, and asking "on just what character of sales do you allow dealers a commission?"[2]

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[1] Com. Ex. 637 E.
See also Com. Exs. 828-7 B-C, 556, p. 14.

[2] Com. Ex. 585 U.

Neylan replied to this on June 21, 1933, setting forth the policy of Lone Star, the reason for it, and the general satisfaction with it and stating his opinion that the proposed Code did not in any way change this policy. Neylan wrote:

"We do not interpret the proposed code of ethics of the Cement Institute as changing the existing selling policy of our Company, which policy is more or less the same as that followed by other manufacturers throughout the territory served by our subsidiaries. Under our present policy we reserve the right to quote and handle direct purchases for the following business.

United States Government.

Railroads filing tariffs with State or Interstate Commissions, including Terminal Railroads.

State Government, counties or agencies thereof, when properly authorized to purchase cement for public improvements or maintenance.

State Government and county work financed by and under the direction of officials of such Government branches.

Large hydro-electric projects outside city limits.

Contractors doing any of the foregoing classes of work located outside cities and towns and not requiring dealer service.

Inquiries for all other classes of work are referred to established building supply dealers in the community where the work is located.

No commissions of any kind are paid to dealers. The dealer's compensation must be obtained from his resale price. In order for the dealer to participate, he must perform the full function of a dealer, which includes assuming the credit responsibility, handling accounts, etc. This permits the dealer to establish his own margin of profit and to a great extent protects the dealer on that class of business which he is equipped to handle.

This policy was established as the result of a long period of dissatisfaction brought about by attempts on the part of dealers to participate in connection with the classes of work which we now reserve the right to sell direct, to the extent that prices were quoted involving as low as $.0025 per barrel as the dealer's margin of profit, which condition invariably resulted in the dealer asking the manufacturer to handle the account and pay the dealer his compensation in the form of a commission.

You can readily visualize what resulted.

Since the establishment of our present policy, there have been relatively few cases where complaints of any nature have been received from dealers, the majority of whom recognize the wisdom of the move which the cement manufacturers were forced to make. As previously stated, our interpretation of the code proposed does not in any way contemplate changing the policy outlined above."[1]

The first printed draft of a code prepared for submission on July 19, 1933 to NRA contained the following provision for the classification of customers:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

["*1. Except as otherwise specified, portland cement shall be marketed in each community through the building material dealers, regularly serving such community. This applies to all classes of buyers except as in Paragraph 2. Importers, brokers, and so-called distributors shall be considered as competitors.*

2. The following classes of buyers shall be sold direct by a manufacturer and at the same price and under the same terms and conditions of sale as to dealers, except as provided in Paragraph 6:

United States Government.

State Government, counties and parishes when properly authorized to purchase cement for public improvements or maintenance.

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[1] Com. Ex. 585 Q-S.

Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities or villages.

Railroads filing tariffs with State or Interstate Commissions including Terminal Railroads and contractors doing work for such railroads.

Owners or contractors buying for power development, flood control, and water supply projects not requiring dealer service.

Concrete products manufacturers, including block tile, roofing, pipe, piling and all other precast concrete units, when for their own manufacturing operations but not for re-sale.

Commercial concrete mixing plants for their own processing operations but not for resale.''][4]

The Code of Fair Competition, approved by the President on November 27, 1933, in Article XI dealing with "Method of Selling and Marketing Cement", contained the following provision as to classification:

"No member of the industry shall discriminate in prices, terms, and conditions of sale at the same time and place of delivery between purchasers or users of cement in the same class and similarly situated.

1. Except as otherwise specified, portland cement shall be marketed in each community through the building material dealers regularly serving such community.

2. Except as otherwise specified, the following buyers shall be sold direct by members of the industry at the same price and under the same terms and conditions of sales as to dealers:

United States Government.

State Governments, Counties, and Parishes when properly authorized to purchase cement for public improvements or maintenance.

[4] Com. Ex. 556, pp. 13-14.

Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities, towns, or villages.

Railroads filing tariffs with State or Interstate Commissions, and contractors doing work for such railroads.

Owners or contractors buying for power development, flood control, and water-supply projects that do not require dealer service.

Concrete Products Manufacturers, including block tile, roofing, pipe, piling, and all other precast concrete units when for their own manufacturing operations, but not for resale.

Commercial concrete mixing plans for their own processing operations, but not for resale.'"[5]

Reiter, then Secretary of the Code Authority, when asked whether Article XI of the Code embodied something new, or was an expression of custom long standing in the industry, replied:

"Article XI prescribed marketing conditions which had long existed in the cement industry."[6]

Witnesses for many companies testified that Article XI was substantially a restatement of their current practices as of 1933.[7] There was some testimony that the Ar-

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[5] Com. Ex. 557, p. 340: Code of Fair Competition, Nov. 27, 1933.

[6] (C) Tr. 17022.

[7] Alpha: Coogan, Vice President (R) Tr. 23594-95.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39856-57, 39914-17.
Dewey: Moore, R. W., Vice President (R) Tr. 47093, 46899.
Edison: Sweeney, Vice President (R) Tr. 35741.
Federal: Bates, J. E., Sales Manager (R) Tr. 30814-16.
Hawkeye: Manley, General Manager (R) Tr. 41631.
Hermitage: McGovern, Sales Manager (R) Tr. 36190, 36201-02.
Keystone: Scott, H. M., President (R) Tr. 27494.

ticle increased direct selling.[8]

However little the terms of Article XI varied the customary practices of the manufacturers, Article XI as part of the Code had the force of law; and variations from its prescriptions might be attended by penalties, then unknown and uncertain. Therefore, many manufacturers wrote to the Code Authority for interpretation of the language. What did it mean in relation to the proper method of selling NRH, or NRM, and CWA work? What was meant by the phrase "cities, towns and villages"? What did the Code prescribe as a correct method for selling cement for the government cemetery at Vicksburgh, and many other questions. Between December 22, 1933 and January 13, 1934 the Code Authority, over the signature of its chairman B. H. Rader, published to all members of the industry, 17 interpretations of Article XI.[9]

Kosmos: Horner, President (R) Tr. 36819-20.
Lehigh: Bowen, Vice President (R) Tr. 27232, 26733-35.
Missouri: Alexander, President (R) Tr. 37269-70.
National: Dannelly, Vice President (R) Tr. 39553, 39547-48.
Nazareth: Robeson, Vice President (R) Tr. 28275, 28462.
Nebraska: Hoenig, Sales Manager (R) Tr. 42067-71.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36484, 36521.
Oklahoma: Thompson, Sales Manager (R) Tr. 46538.
Petoskey: Lucas, Vice President (R) Tr. 38755-56.
Pittsburgh Plate Glass: Letzkus, Sales Manager (R) Tr. 37708.
Reiter, General Manager, The Institute (C) Tr. 17021-22.
South Dakota: Hartley, Sales Manager (R) Tr. 41500-03.
Southwestern (Tex.): Blair, W. R., Sales Manager (R) Tr. 38958, 39167, 38961.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35917.

[8] MacDonald, B. A., *supra*, Tr. 36521.
Resp. Ex. 2712 A-B: General letters to salesmen dated 1/12/34 and 1/25/34 from Cabanis, Sales Manager, Northwestern.

[9] Com. Ex. 1019 B-S.

After testifying that part of Article XI was suspended by order of the NRA Administrator in January, 1934 within six weeks after the adoption of the Code, and following a public hearing, Reiter testified:

"A. • • • Mr. Wooden, it may be interesting to you to know that after this public hearing, which was a very large affair, on Article 11, subject to which it was suspended, the then Deputy Administrator in charge of our code instructed the Code Authority to try and work out an amended Article 11 with both the dealers and the contractors.

And we had a number of meetings looking to that end.

Q. What were the reasons that underlay the suspension of Article 11 in January, 1934? A. I can summarize it in my own opinion.

Q. All right. A. As being a desire on the part of the dealer to have all cement sold through dealers.

Q. I can understand why that desire might not have been conceded by the manufacturer or granted by NRA, but I still do not see the connection of that to the suspension of Article 11 as it had existed in the code up to that time.

• • •

A. Mr. Wooden, there is no question but what this hearing on the suspension of Article 11 was initiated by the dealers, and that means they were not satisfied with the quantity of cement which was sold through them.

Now, I may be in error in stating that they wanted all of it sold through them, but at one time or another members of their Code Authority, or their committee, have to me indicated certain things that they wanted at that time to be sold through them. And when you add them altogether it means practically the same thing.

Now, does that constitute an answer to what you had in mind?

By Mr. Wooden:

Q. As I understand it, your code up to January, 1934, Article 11 of that code, provided that certain

classes of trade should be sold directly and certain sold through the dealers, is that right? A. Yes, sir.

Q. Why couldn't that article continue without a suspension of it entirely, is the point I am trying to make, and you say because they wanted more they suspended it all. I do not know whether I make my point or not. A. I can give you a very practical answer.

Q. All right. A. There are 90 cement manufacturers in the United States, and there are 30,000 dealers. And they had a lot more influence than we did. And the Administrator after this hearing just ordered that it be suspended.

Q. Then what was the situation during the suspension? What was the practice during the suspension? A. Well, that I don't know, until much later.

Q. Was there any real change in the practice during the period of the suspension from what it had been before? A. I can not answer that, Mr. Wooden.

Q. Do I understand you that the dealers made it plain that they wanted to sell even the classes of trade that had long been sold direct, that they wanted to handle that, such as sales to the Government? A. I have even heard arguments on that sale.

However, when they start to concede something from 100 per cent sales through the dealers they first of all concede sales to the United States Government.

Q. How about State governments, the same? A. Yes, they thought at that time that they could do a better job of selling State governments than we could, although that was another thing.

To make this plain, Mr. Wooden, there was a long period of discussion between the dealers' code authority and the cement code authority.

Their original position, which seemed to me to be that they wanted to handle all of the cement sold, gradually was changed, so finally they seemed to be about willing to take, or accept a marketing practice as was originally specified by Article 11. By that time May 27, 1935, had arrived."[10]

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[10] (C) Tr. 4264-67.

As to the activity of the Dealers' Code Authority and the change in their point of view veering toward support of Article XI, Reiter testified:

> "A. Well, I was present at the public hearing on the suspension of Article XI. I knew, and was present at these negotiations, or at least some of them between the Cement Code Authority and the Dealer Code Authority and in my opinion, the Dealer Code Authority, was quite active, both in the suspension or causing the suspension of Article XI, and in the efforts to reinstate it.
>
> Trial Examiner Norwood: What changed their minds about that, if you know?
>
> The Witness: As to the suspension of Article XI, the marketing practices for the industry varied in all parts of the country, and became unsatisfactory to the dealers, themselves, until such time as they thought they were better off with Article XI of the Cement Code than they were without any article on marketing practices."][11]

6. Classification Following Elimination of Article XI From the Code

During 1934 the manufacturers received many requests from dealers and dealer associations to return to their pre-Code practices or to refrain from quoting direct.[1]

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[11] (C) Tr. 17026.

[1] Alpha	4/ 9/34	Com. Ex. 731-6 G
Alpha	4/12/34	Com. Ex. 731-6 G
Alpha	7/31/34	Resp. Ex. 702
Alpha	8/ 1/34	Resp. Ex. 701
Alpha	8/ 7/34	Resp. Ex. 699
Alpha	8/ 8/34	Resp. Ex. 700
Alpha	9/25/34	Resp. Ex. 694 A-B
Alpha	10/17/34	Com. Ex. 867-7 D-7 E
Alpha	11/ 1/34	Com. Ex. 867-7 X
Alpha	11/ 5/34	Com. Ex. 731-6 F
Colorado	6/ 8/34	Com. Ex. 581 F

The files of the Ideal Company disclosed a memorandum[2] dated February 17, 1934 initialed McC, and presumably prepared by W. H. McCrary of the Colorado Company, one of the Ideal group. It began:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

> *"Memo to Sales Managers:*
>
> *Attached hereto a complete copy of Cement Trade Practices revised to and made effective February 17, 1934. The pertinent changes from former revisions are in Sections 7 and 8, and specifically in reference to NRM projects (Section 7) and CWA projects (Section 8) * * * If not clear after study call up."*[3]

After setting forth the definition of a dealer it continued:

> "A contractor is one who buys and uses Portland Cement for specific work under written agreement with the owner or agent duly authorized to contract therefor.
>
> Except as otherwise specified in these Trade Practices, a contractor shall be quoted and sold by, or for the account of, a recognized local dealer upon a consumer basis, according to the terms designated by the dealer and acceptable to the manufacturer.

Lone Star	7/30/34	Com. Ex. 919 D-E
Medusa	1/29/34	Resp. Ex. 3183 K-L
Medusa	2/24/34	Resp. Ex. 3183 R-S
Medusa	11/ 3/34	Resp. Ex. 3183 B
Medusa	11/ 6/34	Resp. Ex. 3183 Z
Nazareth	1/ 2/34	Resp. Exs. 1609 A-B; 1608 A-B
Nazareth	1/29/34	Resp. Ex. 1553 A-B
Northwestern States	3/26/34	Resp. Ex. 2712 F-G
Peerless	1/29/34	Resp. Ex. 2455
Peerless	3/22/34	Resp. Ex. 2454
Peerless	9/20/34	Resp. Ex. 2456 A-B

[2] Com. Ex. 947-16 L, *supra*, p. 2268.

[3] Id., Findings, Par. 17(d).

If the dealer serving the territory wherein said work is located refuses or fails to function as such, the manufacturer may quote and sell the contractor direct upon a consumer basis of ten cents per barrel above the dealer basis, the manufacturer retaining such differential; and complete and conclusive contract covering the transaction shall be entered into in writing between the contractor and such manufacturer.

A manufacturer shall not agree to or finance a contractor, or carry his account, or pay or permit to be paid to a contractor any rebate, commission or other remuneration.'"[4]

The memorandum then continued with instructions as to sales to concrete products plants and ready-mixed concrete plants, to industrial plants, to apartments, residences, and subdivisions, to Federal and State highways, Federal and State buildings, hydro-electric plants, county, township and city work, and railroad work. Concerning sales to Federal and State highways, the instructions stated:

"A duly authorized department of the Federal Government, or of a state government, requesting bids to be publicly opened and awarded for cement requirements on the above highways duly planned, located and construction authorized, shall be quoted and sold direct on a dealer basis.

Any contractor publicly awarded contract for above, for which he is obligated to, and does, furnish the cement, may be quoted and sold direct on a dealer basis.

Provided, that NRM projects shall be quoted and sold in District 8 and the entire State of Missouri as follows:

(a) Where bids are received and award made on NRM project independent of any other construction, the same shall be quoted and sold through a recognized local dealer; but

[4] Com. Ex. 947-16 M.

(b) Where bids are received and award made on an NRM project in connection with other construction, such as NRH and NRS projects the same shall be quoted and sold direct on a dealer basis."[5]

In the instructions as to sales for Federal and State buildings, the first paragraph stated:

"(a) A duly authorized department of the Federal Government or of a state government, requesting bids to be publicly opened and awarded for cement requirements for buildings duly planned, located and construction authorized, shall be quoted and sold direct on a dealer basis."[6]

Concerning the importance, if any, of this memorandum, Hoenig, the Sales Manager of Nebraska, a subsidiary in the Ideal group, testified:

"Well, you might be surprised to know that this is the first one that I recall ever having received of that character or of any other character. As I told you before, we have very little intercourse with the Denver office at all, so far as policy is concerned, so far as sales are concerned we seem to run our business, surprising as it may be, just like an independent company, and if that came through, as it indicates there that it did, it was considered by us merely a matter of routine and nobody paid any attention to it any more than I did to the copy of the Code that was shown here, or proposed Code, or whatever it was, a while ago. There was so much of that stuff coming through the mails that we considered much of it like advertising."[7]

[In March, 1934, Lucas, the Trustee for District No. 12, sent to the manufacturers in his district a copy of a proposal made by the Code Authority of the Builders Supply

[5] Com. Ex. 947-16 o.

[6] Com. Ex. 947-16 o.

[7] (R) Tr. 42140.

Industry upon the classification of cement business to be incorporated in the cement code, in the following terms:

"METHOD OF SELLING AND MARKETING CEMENT

I. Members of the industry shall not sell through dealers for the requirements of:

(A) The United States Government, except——

1—CWA projects when such projects are located in whole or in part within a city, town or village.

2—PWA projects, when such projects are located wholly or *principally in a city, town or village.

3—Any other government relief agency projects when located wholly or *principally within a city, town or village.

(B) State governments, when properly authorized to purchase cement for public improvements or maintenance, except——

1—Contractors doing work for a state where the project involved is located entirely or *principally within a city, town or village.

(C) Railroad filing tariffs with State or Interstate Commissions, except——

1—Contractors doing work for such railroads where projects are located entirely or *principally within a city, town or village.

(D) Owners or contractors buying for power development, flood control or water supply projects except where located wholly or *principally within a city, town or village.

(E) Concrete products manufacturers (including block, tile, roofing, pipe, pre-cast piling and all other pre-cast concrete units) for their own manufacturing operations but not for resale.

II. A dealer in builder supplies, when purchasing cement from members of the industry, shall be allowed such trade discount from the then current market price of cement, as is established and in effect in the Code of Fair Competition of the Builders Supply Industry, as the cost of selling cement in carload or barge load quantities.

(Note: "Principally means 50% or more)"[8].

The members of District 11 in California submitted a proposed "Method of Selling and Marketing Cement" to the Code Authority and asked for its cooperation in securing the approval thereof as applicable to District 11.[9]

On June 8, 1934 the Code Authority sent to all members of the industry a revised Article XI and the Chairman's letter of transmittal stated:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

["*I enclose herewith New Article XI. I am able to advise you that the National Federation of Builders Supply Associations, Inc. have accepted this on the basis that it will be put in for a four or six-months' trial period, and if at the end of that time, it is not working satisfactorily to either the dealers or the manufacturers, we will both go to Washington and try to have it corrected so that it will be satisfactory, to both of us.*]

This new Article XI has been approved by the Trustees for the Industry and is being submitted to the Administration in Washington, and there will, of course, be a public hearing."[10]

A hearing was held by the NRA on July 14, 1934 and Conn, President of the Institute, attended and read a prepared statement. In the summary thereof he said:

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[8] Com. Ex. 645 E-F.

[9] Com. Ex. 645 H-M.

[10] Com. Ex. 1021 A.

"First, the representatives of the Cement Industry are here today for the specific purpose of reinstating Article XI as an integral and necessary part of our code.

Second, our industry cannot afford to continue to pay the code wages or to abide by the curtailed workings hours if we are to be stripped of the means to pay these increased costs."[11]

At a meeting of the Trustees of the Institute on August 15, 1934 a motion was unanimously carried to request the Code Authority "to endeavor to insert in the Code, in proper place, some provision, or provisions, to prevent establishment of, or continuation of, jobbers in the cement business."[12]

However, no reinstatement of the suspended portion of Article XI or revision thereof was made effective, and the revised Code,[13] effective six days before the unconstitutionality of the NIRA was announced, contained no equivalent provision.]

a. February 1935 Announcements

The uncertainty, both of dealers and manufacturers, as to classification of trade to be sold through dealers or direct, led to an announcement of definite policy by Lehigh in February, 1935. Bowen, Vice President of Lehigh, testifying as to the expectation of benefit from this announcement of policy, said:

"A. My observation was that the dealers who had been hostile to Article XI very quickly changed their viewpoint as to the elimination of Article XI, and were not only willing but anxious to have some sort of article restored.

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[11] Com. Ex. 598 L.

[12] Com. Ex. 560.

[13] Com. Ex. 621 F-G: Trustees' Minutes 8/15/34.

Q. Did the Lehigh Company take any action of its own with regard to the reinstatement of Article XI? A. Yes, we did. In December of—along about December of 1935 we—by December, the latter part of 1934, and the early part of 1935—we came to the conclusion that it would be a very good move on the part of the Lehigh Company to once again announce a definite sales policy of its own.

Q. Was that independent of any action with respect to Article XI, or did it have reference to that? A. By that time it seemed to us that the delays in reestablishing Article XI in the Code were apt to be interminable very scant progress seemed to be made, we had very little information as to what that program was, and decided that we could make a good stroke by formulating and announcing the policy of our own, that the adoption of such a policy was likely to be received favorably by the dealers, and that that favorable reaction might cause the dealers to press our competitors to do likewise, even though the movement that we made might have proven unsuccessful if we had not been followed by enough manufacturers to make the policy succeed, we would still gain a great deal of credit with the dealers for trying, and hoped that that would bring us increased business.

Following this line of reasoning we decided early in 1935 that we would issue a policy.

Q. And did you then issue one, Mr. Bowen? A. Yes, we did, February, 1935."[1]

After referring to the unlikely prospect of an early settlement of the issue of Article XI, and numerous requests from dealers for a declaration of sales policy, this announcement stated:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

"For sometime efforts have been directed by both dealers and manufacturers toward establishing a policy for the sale of cement which would adequately protect all interests concerned.

[1] (R) Tr. 26740-41.

Efforts to secure approval of the marketing provisions of the Code of Fair Competition for the Portland Cement Industry have thus far produced no definite results. The prospect for an early settlement of this very important matter is not encouraging.

Numerous requests have been received from dealers for a declaration of sales policy and in answer to these requests we set forth below the policy which will hereafter be followed in the distribution of our products

Lehigh Cements will be sold to and through dealers, except for the following buyers, whom we will sell direct:

1. The United States Government and State Governments. (Provided that cement for work of Federal relief agencies located entirely within cities, towns or villages will be sold through dealers.)
2. Counties and Parishes. (Provided that contractors on county or parish bridges and culvert work awarded separately from highway contracts will be sold through dealers.)
3. Railroads filing tariffs with State or Interstate Commissions.
4. Water power and water supply developments, flood control and irrigation projects, except when such work is located entirely within cities, towns or villages.
5. Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities, towns or villages.
6. Manufacturers of concrete and cement products, for their own manufacturing operations but not for resale.
7. Commercial concrete mixing plants, at their regularly established places of business, for their own processing operations, but not for resale."[2]

[2] Com. Ex. 643 B-C.

As to the independent determination of this policy, Bowen testified:

> "A. During the time, immediately after the elimination of Article XI, there were a good many discussions between manufacturers and dealers on the subject of a revised article, and the Lehigh Company participated in some of those discussions, but our action in February, 1935, was not preceded by any discussions with either competitors or dealers. It was an action taken entirely on our own decision, and we had no idea as to whether any competitor would follow it."[3]

Asked if he recalled whether Lehigh's competitors followed its policy announced at this time, Bowen replied:

> "A. Yes, I do. It was very readily apparent that the policy was being favorably received by the dealers and would react greatly to the Lehigh Company's advantage, so there was a great rush on the part of competitors to get on the band wagon."[4]

Other companies immediately came out with an announcement similar to that of Lehigh. Concerning the announcement[5] made by Alpha, Coogan, Vice President of Alpha, testified:

> "Q. Did there ever come a time when you issued a printed announcement of your policy? A. Yes, some time in February of 1935. We had been pressed very hard by many of our dealers for some definite policy or for some definite statement of policy as to what we would or would not sell direct. We had them ever since Article XI had been canceled, and, as I remember it, early in February, 1935, there was one company, the Lehigh Company, that issued a

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[3] (R) Tr. 26741-42.

[4] (R) Tr. 26744.

[5] Com. Ex. 731-4 F.

trade policy which was sent out to the dealers and contractors generally.

Now, these inquiries indicated,—our inquiries, I mean,—indicated that while that policy was not all that the dealers wanted it did seem to satisfy the dealers, as far as we could learn, and shortly after we had found that policy we came out with a similar policy. I do not know that it was exactly in every word the same but it was similar to that policy that was issued by the Lehigh Company several days before.

• • •

Q. Will you tell us how you happened to issue that policy at that time? A. After the Lehigh policy was announced there was even more insistence than ever on the part of our dealers that we do something definite about our selling policies, and they indicated to us, as I have said, that while the Lehigh policy was not all that they wanted, that it was fairly satisfactory to them, and after getting these complaints and these demands for a statement we decided to come out and issue a policy and circulate it among all of our trade.

Q. On the question of time, Mr. Coogan, how long, in the ordinary course of business, does it require for you to learn of your dealer reaction in this way? A. Well, we learned—we have an immediate dealer reaction as soon as a price or a policy of an important competitor company reaches them; sometimes we have them by phone, sometimes we have them by letter, sometimes we have them by our salesmen or through our salesmen, and sometimes in other ways we get that information. We have dealers located very close by, and if they get a new policy they will phone or they will even come in to talk it over or telephone us and ask for somebody to step in to see them. It is no trouble. I should say that we get that information certainly the following day.

Q. Well, now, as to this Lehigh policy, what was your experience? Was it satisfactory, as far your company was concerned? A. Well, in a general way, it did not exactly meet everything, but we felt

that on the whole that it was a good fair policy, and we were quite willing to adopt it.'"[6]

Diamond in its circular to its salesmen concerning its statement of marketing policy on February 23, 1935 stated the reason for the policy and the independence of judgment in the exercise thereof as follows:

"Inclosed herewith statement of marketing policy which we are mailing to the trade today.

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

Announcement is made at this time because the Consumer's Advisory Board and the legal division of the NRA have definitely and finally blocked all efforts to include any classification of buyers in our Code. Please understand that the Industry was perfectly willing to compromise with the dealers, and in fact, several such compromises were arrived at during the past year. Action in each case was blocked by the National Recovery Administration. This statement of policy represents practically the last compromise.

It seems to me that it is entirely clear, and that no further explantion is required. If we received inquiries from dealers asking for further details, we can reply only by forwarding them a second copy of this announcement, since any attempt at explanation would only lead to confusion.

Please understand that the provision for direct sale to certain types of buyers is not mandatory. It is up to you to exercise your judgment as to whether or not you will sell products manufacturers direct or not in any given market.'"[7]

Robeson, Vice President of Nazareth, testifying to the confusion of policy following suspension of Article XI with

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[6] (R) Tr. 23595-97.

[7] Com. Ex. 1923.

the resultant unsatisfactory condition for dealers and manufacturers alike, said:

"Q. With respect to this subject matter, how had you been operating, Mr. Robeson, after the suspension of Article XI? A. We had been operating on what I would call a catch-as-catch-can basis. We had customers in one locality wanting us to do one thing, customers in another locality wanting us to do another thing. Then we had competitive situations that we had to meet so that we were practically without a defined policy of any kind.

Q. What had you observed, if anything, as to the effect of that policy on not only your dealers but on your contractors? A. Well, it was causing a great deal of dissatisfaction with our dealer customers.

Q. How did that affect your company? A. Well, when you cause dissatisfaction with your customer you lose the one thing that you spent a lot of money and time building up, and that is the good will of that customer.

Q. Well, under that policy, what was your experience with reference to jobs being quoted direct to the contractors as to what the dealers requested?

• • •

A. Well, during that period that we were on that catch-as-catch-can basis, we found that in some localities dealers were asking us to place through them business which we previously would have sold direct, and, on the other hand, we found some localities where contractors were buying direct from manufacturers on work that we previously said we would handle through dealers. So we were in a constant state of turmoil.

By Mr. Leisure:

Q. Well, can you tell us whether or not any of your dealers wanted you to discriminate against any particular contractor, or against contractors in other sections? A. Not against any particular contractor, but the dealer had ideas fundamental, that he would like to have all the business placed through him.

That was the major tenor of the dealers' story all through that period.'"[8]

There is other evidence from witnesses and also letters from dealers in evidence complaining of the uncertainty of policy as to classification.[9]

As a result of this unsatisfactory condition and of the general acceptance of the Lehigh announcement, as testified by Coogan, there followed announcements during February and March, 1935 by at least thirty companies.[10]

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[8] (R) Tr. 28269-71.

[9] Resp. Ex. 2712 D: Letter dated 3/31/34, Jackson, Standard Lumber Co. to Cabanis, Northwestern States.
Resp. Ex. 2436 A, B: Memorandum dated 7/17/34, Luck, Peerless to Russell.
Resp. Ex. 694 A, B: Letter dated 9/25/34, Weinel, Illinois Lumber Dealers Assn. to Alpha.
Resp. Ex. 3183 B: Letter dated 11/3/34, Illinois Lumber & Material Dealers Assn. to Medusa.
Resp. Ex. 3183 Z: Letter dated 11/6/34, Medusa to Illinois Lumber & Material Dealers Assn.
Resp. Ex. 1608 A, B: Inter-office memorandum dated 1/7/35, Robeson, Nazareth to Barber.
Com. Ex. 867-7 D-7 E: Letters dated 3/17/34, 3/18/34, Illinois Lumber & Material Dealers Assn. to Alpha.
Com. Ex. 867-7 I: Letter dated 12/6/35, Alpha to Illinois Lumber & Material Dealers Assn.

[10]

Lehigh	2/20/35	Com. Exs. 643 B, C, 870-2 B, 873 C, D, 2196 Resp. Exs. 2485 A, B, 1746, 1747, 2134
Edison	2/21/35	Resp. Ex. 2568
Lawrence (no copy)	2/21/35	Com. Ex. 270 J
Lone Star	2/21/35	Com. Ex. 1165 B, I, J, V, Y Resp. Ex. 1750 A, B
Nazareth	2/21/35	Resp. Ex. 1489
Penn-Dixie (no copy)	2/21/35	Com. Ex. 1192
Universal Atlas	2/21/35	Com. Ex. 886 D Resp. Exs. 1748, 1749 Resp. Ex. 3641 B

These classifications, in the main, follow Article XI,[11] and were practically verbatim.

Hermitage	2/22/35	Resp. Ex. 2698
Lone Star	2/22/35	Com. Ex. 1165 M, N Com. Ex. 1165 O, P Com. Exs. 873 E, F, 1165 T, U
Medusa	2/22/35	Resp. Ex. 3158 E Dawson, Vice President (R) Tr. 40065-66
Alpha	2/23/35	Com. Ex. 731-4 F, Coogan, Vice President (R) Tr. 23596
National (no copy)	2/23/35	Dannelly, Vice President (R) Tr. 39753-54
Coplay	2/23/35	Com. Ex. 1140
Diamond	2/23/35	Com. Exs. 1924, 1923
Federal	2/23/35	Resp. Ex. 2131 A, B
Kosmos	2/23/35	Resp. Ex. 2767
Lone Star	2/23/35	Com. Ex. 1165 W, X
Standard	2/23/35	Resp. Ex. 1752
Southwestern	2/23/35	Resp. Ex. 1745
Petoskey (no copy)	2/25/35	Lucas, Vice President (R) Tr. 38718
Pittsburgh	2/26/35	Com. Ex. 1933 Resp. Ex. 1754
Wabash	2/26/35	Resp. Ex. 1753
Ash Grove	2/27/35	Com. Ex. 873 G
Giant (no copy)	before 2/27/35	Resp. Ex. 2926
Hercules (no copy)	before 2/27/35	Resp. Ex. 2926
North American (no copy)	before 2/27/35	Resp. Ex. 2926
Oklahoma	2/27/35	Resp. Ex. 3579
Castalia (no copy)	2/28/35	Com. Ex. 1935
Wolverine	2/28/35	Resp. Exs. 1755, 1756
Southern States	3/ 1/35	Resp. Ex. 2891
Nebraska	3/ 5/35	Resp. Ex. 3421 A, B
Arkansas	3/ 6/35	Com. Ex. 873 M

[11] Bowen, Vice President, Lehigh (R) Tr. 27234.
Horner, President, Kosmos (R) Tr. 36961 65.

Every company but Lehigh testified that it picked up Lehigh and other announcements in the field.[12] They followed Lehigh because dealers requested at least that much protection.[13]

b. Dealer Criticism

These February announcements were not entirely satisfactory to the dealers, and complaints were repeatedly

[12] Alpha: Coogan, Vice President (R) Tr. 23597.
Coplay: Twamley, Vice President (C) Tr. 7081-82.
Dewey: Moore, R. W., Vice President (R) Tr. 47084.
Resp. Ex. 3641 A, 2/23/35.
Federal: Bates, J. E., Sales Manager (R) Tr. 30814-17, 30850-51, 30691-92.
Hermitage: McGovern, Sales Manager (R) Tr. 36246-47.
Kosmos: Horner, President (R) Tr. 36964.
Medusa: Dawson, Vice President (R) Tr. 40065-66.
Missouri: Alexander, President (R) Tr. 37271-72.
National: Dannelly, Vice President (R) Tr. 39554.
Nazareth: Robeson, Vice President (R) Tr. 28266, 28468, 28252-57, 28266-68, 2/21/35.
Resp. Exs. 1490, 1491 A, B for id.
Nebraska: Hoenig, Sales Manager (R) Tr. 42072-73.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36529-30.
Peerless: Russell, Vice President (R) Tr. 34493.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37940-41.
Southwestern (Ohio): Warren, G. E., Vice President (R) Tr. 29082-85.
Universal Atlas: Stone, Vice President (R) Tr. 35088-89.

[13] Federal: Bates, J. E., *supra*, Tr. 30850-52.
Hermitage: McGovern, *supra*, Tr. 36246-47.
Nazareth: Robeson, *supra*, Tr. 28251.

made that too much cement was being sold to contractors.[1]

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[1] Resp. Ex. 688 A-B: Letter dated 3/16/35, Whitney, New England Builders Supply Assn. to Alpha.
Resp. Ex. 689: Resolution on direct sales enclosed in above letter.
Resp. Ex. 690: Resolution on dealer definition enclosed in letter 3/16/35, New England Builders Supply Assn. to Alpha.
Resp. Ex. 1610 A-B: Interoffice memorandum dated 2/28/35, Robeson, Vice President, Nazareth to Emack.
Resp. Ex. 3580 B: Bulletin to dealers dated 3/8/35 from Woods, Secretary-Manager, Southwestern Lumbermen's Assn.
Resp. Ex. 686: Letter dated 3/18/35, Ruffin, Virginia Lumber & Building Supply Dealers Assn. to Members.
Resp. Ex. 1611: Letter dated 2/26/35, Snook, Treasurer, Hill City Coal & Lumber Company to Nazareth.
Resp. Ex. 2926: Interoffice letter dated 2/27/35, Parsons, Sales Manager, Volunteer to Hanahan, President.
Resp. Ex. 1612: Interoffice memorandum dated 2/28/35, Robeson, Vice President, Nazareth to Hogan.
Resp. Ex. 2132 A-B: Letter dated 3/2/35, Mitchell, President, Empire Builders Supply Co. Inc. to Bates, J. E., Sales Manager, Federal.
Resp. Ex. 2133: Letter dated 3/5/35, Bates, J. E., Sales Manager, Federal to Empire Builders Supply Co. Inc.
Resp. Ex. 2713 B: Letter dated 3/5/35, Midwest Lumber Company to Northwestern States.
Resp. Ex. 2713 F: Interoffice memorandum dated 3/7/35, Danielson, Northwestern States to Cabanis.
Resp. Ex. 2713 G: Letter dated 3/5/35, Bingenheimer Mercantile Co. to Northwestern States.
Resp. Ex. 2713 H: Letter dated 3/5/35, MacDonald, Bingenheimer Mercantile Co. to Lehigh.
Resp. Ex. 3641 G-H: Letter dated 3/14/35, Dealers to Capen, Sales Manager, Dewey.
Resp. Ex. 691 A-B: Letter dated 3/7/35, Giessing, S.E. Missouri Retail Lumber Dealers Association to Alpha.
Resp. Ex. 3580: Letter dated 3/11/35, Woods, Southwestern Lumbermen's Association to Thompson, Assistant Sales Manager, Oklahoma.
Resp. Ex. 2713 L: Letter dated 3/12/35, Palmer McGregor Bros. & Co. to Northwestern States.
Resp. Ex. 3641 A: Interoffice memorandum dated 2/23/35, Caldwell, Dewey to Harrison.

Dealers also complained that there was no statement of what constitutes a dealer.[2]

Among the dealer comments that of the Empire Builders Supply Company, Inc. of Niagara Falls, New York to Federal dated March 2, 1935 is of particular interest because of its candid description of the issue which disturbed both manufacturers and dealers at that time. It wrote:

> "Inasmuch as statements of this policy have been received from a number of cement companies it is to be assumed that this is now the general policy of the entire industry.
>
> It is estimated that Federal, State, and County governments, using public monies, will consume about 85% of the cement shipped this year, leaving 15% for private projects. A heavy percentage of this 85% will be used outside of cities, towns and

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Resp. Ex. 3641 C-D: Letter dated 3/13/35, Hunter, Hunter Lumber Company to Dewey.

Resp. Ex. 688 A-B: Letter dated 3/16/35, Whitney, New England Builders Supply Association to Alpha.

Resp. Ex. 2713 E: Letter dated 3/12/35, Cabanis, Northwestern States to Bingenheimer Mercantile Co.

Com. Ex. 2390: Letter dated 2/25/35, MacQueen, National Federation of Builders Supply Associations to Chaffee, Globe Plaster Co.

Com. Ex. 2393: Letter dated 2/25/35, MacQueen, National Federation of Builders Supply Association to Fryer.

Com. Ex. 2394 A-B: Letter dated 3/1/35, Building Material Merchants of Chicago District to MacQueen.

Com. Ex. 737-2 W: Letter dated 3/12/35, Thompson, Sales Manager, Oklahoma to Woods, Secretary-Manager, Southwestern Lumbermen's Association.

Com. Ex. 737-2 A-2 C: Letters dated 3/13/35, 3/16/35, Woods, to Thompson, Oklahoma.

Sweeney, Vice President, Edison (R) Tr. 35756-57.

Hoenig, Sales Manager, Nebraska (R) Tr. 42076-77.

[2] Bowen, Vice President, Lehigh (R) Tr. 27238-39.

Resp. Ex. 690: Resolution on dealer definition enclosed in letter dated 3/16/35 from New England Builders Supply Assn. to Alpha.

villages; according to this set-up it will leave a very small quantity of the entire production to be marketed through builders supply dealers.

I have never been able to understand why cement manufacturers specifically exclude dealers from participation in railroad contracts. Since we pay the railroads such enormous freight charges it would appear to me that there should be no reluctance on the part of railroads to cooperate with us and leave at least a part of these freight charges in the towns or cities where they are collected.

However, the present announced selling policy of the industry probably will continue until we dealers decide among ourselves to look the facts squarely in the face. It is not reasonable to ask manufacturers of cement to give dealers practically 100% distribution of their products until our industry has indicated its ability to serve manufacturers 100% through intelligent and fair classification of its dealers. Not all so-called 'Dealers' are equipped physically, financially, or by experience to service projects of large dimension, particularly dealers in smaller localities. This failure to classify ourselves and the reluctance of manufacturers, contractors, and purchasing agencies, to pay the average dealer for a service he cannot or does not perform was, I assume, one of the principal factors considered by you manufacturers when direct selling for sizable projects came into existence, several years ago. In addition to qualifications mentioned above, a dealer, in order to be eligible for recognition as a marketer of cement for large projects, should have an established and provable record of not less than three years as a bona fide seller of cement, so that the subterfuges resorted to by many manufacturers under a selling policy adopted a few years ago, through which hardware stores, lumber concerns, grocery stores, and even drug stores became dealers with a commission of anything from one cent a barrel upward, can not be repeated. Doubtless you will recall the experiences of large contractors, particularly road builders and others working outside of cities, who under that same policy were compelled to pay some so-called 'Dealer' a commission of from five cents a barrel upward.

and then guarantee the account to the manufacturer.'"[3]

About this time the Federal Government was considering its PWA program involving the spending of $4,800,000,000 on construction projects and dealers were afraid that under the February announcements cement for use in this program would be sold direct.[4]

c. April 1935 Announcements

As a result of this dissatisfaction by dealers Lehigh issued on April 6, 1935 a new announcement more favorable to dealers. This announcement contained a definition of "dealer" and reserved to the dealer all cement purchases made by relief agencies. Other changes consisted in limiting the direct sales to "large" concrete products companies and restricted sales to county work outside cities, towns and villages.[1] There then followed announcements by other companies in line with Lehigh's revision of policy.[2] As to the inclusion of a definition these are

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[3] Resp. Ex. 2132.

[4] Reiter, Cement Code Authority (C) Tr. 4318-20. *Infra*, p. 2385 *et seq.*

[1] Com. Ex. 2262 A-B.

[2]

Company	Date	Reference
Lehigh	4/ 6/35	Com. Ex. 2262 A, B Resp. Exs. 1759 A-B, 1613 A-B
Alpha	4/ 8/35	Resp. Ex. 685 Coogan, Vice President, Alpha (R) Tr. 23608
Nazareth	4/ 8/35	Resp. Ex. 1488
Edison	4/ 9/35	Resp. Ex. 2585
Lone Star	4/ 9/35	Com. Ex. 1165 A Resp. Ex. 1761 A-B Com. Exs. 1165 D-H, 89 A-B
Lawrence	4/ 9/35	Com. Ex. 270 J
Universal Atlas	4/ 9/35	Resp. Exs. 1760, 2713 M
Arkansas	4/10/35	Com. Ex. 873 I

the same announcements referred to under the discussion of definition.[3]

Company	Date	Reference
Federal	4/10/35	Resp. Ex. 2135
Lone Star	4/10/35	Com. Ex. 1165 K, L
Medusa	4/10/35	Com. Ex. 819 X Dawson, Vice President, Medusa (R) Tr. 40066 Resp. Exs. 1762, 3158 F
Oklahoma	4/10/35	Resp. Ex. 3581
Penn-Dixie	4/10/35	Com. Ex. 1192
Diamond	4/11/35	Com. Ex. 1925
Edison	4/11/35	Resp. Ex. 2584 A, B
Castalia	4/13/35	Com. Ex. 1935
Kosmos	4/13/35	Resp. Ex. 2768
Superior	4/15/35	Resp. Exs. 1763-65, 1855 Com. Ex. 1936
Northwestern States	4/18/35	Com. Ex. 1907
Pittsburgh	4/18/35	Com. Ex. 1934 Resp. Ex. 1766
Wabash	4/20/35	Resp. Ex. 1767
Southwestern (Ohio)	4/22/35	Resp. Ex. 1758 (See interpretations Resp. Ex. 1757)
Nebraska	4/25/35	Resp. Ex. 3422
Monarch	4/30/35	Com. Ex. 2389
Volunteer	5/ 1/35	Resp. Ex. 2925
National	5/ 2/35	Resp. Ex. 3039
Dewey	5/ 6/35	Com. Ex. 2386
Hermitage	5/ 6/35	Com. Ex. 813-2 B McGovern, Sales Manager, (R) Tr. 36247
Aetna	5/22/35	Com. Ex. 90 A
Consolidated	5/27/35	Resp. Exs. 1768-69
Wolverine	6/ 1/35	Com. Ex. 2412 Resp. Ex. 2631 A-B Nelson, Vice President (R) Tr. 35989-90
Marquette		Colburn, Vice President (R) Tr. 39982

[3] *Supra*, p. 2269, footnote 27.

In general, the Lehigh announcement was followed by most, if not all, of the companies east of the Rockies. In Texas, however, the announcements were not issued until several months later.[4] All of these were practically verbatim except for the Texas announcements. All companies but Lehigh picked up the competitors' announcements in the field.[5] Dealers and dealer associations seemed to be better pleased with the April announcements.[6]

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[4]

Company	Announced	Reference
San Antonio	7/20/35	Com. Ex. 2418
Trinity	7/22/35	Com. Ex. 2369 A, B
Lone Star (Dallas)	7/23/35	Com. Exs. 1165 Q, 2420
Univ. Atlas (Waco)	7/25/35	Com. Ex. 2265 Resp. Ex. 2482
Southwestern (El Paso)	7/25/35	Resp. Ex. 2977 A, B

[5] Aetna: Cree, Sales Manager (C) Tr. 806.
Alpha: Coogan, Vice President (R) Tr. 23608.
Dewey: Moore, R. W., Vice President (R) Tr. 47088.
Federal: Bates, J. E., Sales Manager (R) Tr. 30816-17.
Hermitage: McGovern, Sales Manager (R) Tr. 36247.
Kosmos: Horner, President (R) Tr. 36965.
Lawrence: Ackerman, Sales Manager (C) Tr. 7360.
Medusa: Dawson, Vice President (R) Tr. 40066.
Nazareth: Robeson, Vice President (R) Tr. 28311.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36530-31.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37940-41.
Southwestern (O): Warren, G. E., Vice President (R) Tr. 29098.
Southwestern (Tex.): Blair, W. R., Sales Manager (R) Tr. 38980.
Volunteer: Resp. Ex. 2927 A-C.

[6] Com. Ex. 2391: Letter dated April 12, 1935, MacQueen, National Federation of Builders Supply Association to Secretaries of Federated Units.
Com. Ex. 2392: Letter dated April 19, 1935, MacQueen to Secretaries.
Resp. Ex. 693 A-B: Letter dated April 15, 1935, Druacker and Fryer, Building Material Merchants of Chicago to Members.

Typical of the reasons stated by representatives of various companies for these February and April announcements were those given by Horner, President of Kosmos, who testified:

> "A. There was a good deal of uncertainty. Article XI of the Code was under suspension and the dealers wanted to know what was what. Apparently other companies were under the same pressure from their dealers, and one or more of them got out a statement of policy. We picked up one of those statements and thought it would be a good thing for us to do, and I think we imitated it substantially.
>
> Q. Now, can you tell us whether or not after some of the other companies issued these policies dealers brought this to your attention also? A. We got them. I do not know whether through dealers or whether our own salesmen picked them up.
>
> Q. And would you look at that policy in February, 1935, and tell us whether or not that announcement involved any substantial departure from your previous practices? A. I can say from memory that it did not.
>
> Q. Now, would you tell us what were the circumstances existing in the territory where you market cement at the time you issued that policy in April, 1935? A. Well, some of the other companies made revisions in their previous announcements of policy, and we imitated them. I cannot say that we used exactly the same language, but in substance we gave the dealers the same policy that they did.

Resp. Ex. 3037: Letter dated April 24, 1935, Morrison, Secretary, Georgia Retail Lumber & Building Supply Association to National.

Bowen, Vice President, Lehigh (R) Tr. 26747-48.

Robeson, Vice President, Nazareth (R) Tr. 28314, 28320-21.

Sweeney, Vice President, Edison (R) Tr. 35762.

Moore, R. W., Vice President, Dewey (R) Tr. 47088-89.

NOTE: Texas dealers still opposed Com. Ex. 2421: Memorandum dated April 15, 1935, Zimmerman, Lumbermen's Assn. of Texas to all Members.

Q. And in this case, too, where did you secure the information as to what the policies were announced by other companies? A. Either by some dealers, or by some of our salesmen; I cannot say.

Q. And when you say from salesmen, you mean from salesmen picking them up in the field? A. That is right."[7]

Of similar import is the testimony of Hoenig, Sales Manager of Nebraska, who testified as to his relief at the crystallization of policy brought about by the announcement of some company from the east:

"A. Well, there was a period in there after the abandonment of Article XI when nobody seemed to know what the policy was. Our dealers were not able to find out from anybody how cement should be sold or how they wanted it sold. We were not able to. For quite a period there we studied the situation and watched what was being developed in the territory, and finally we were rather glad to see somebody come out with some kind of a crystallized program that would throw some light on it. I have forgotten,—I do not know who it was,—but one of the cement companies from the East came out with a policy of that character, and that gave us something to think about and work on for our own trade, and that letter was the result of what happened at that time."[8]

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[7] (R) Tr. 36964-65.

See also: Brooke, Vice President, Monarch (R) Tr. 42414-15.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37941.
Dannelly, Vice President, National (R) Tr. 39554.
McGovern, Sales Manager, Hermitage (R) Tr. 36247.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36532.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46546.

[8] (R) Tr. 42072-73.

d. Application of Announced Policies

Brooke, Vice President of Monarch, followed a flexible policy even after his company issued its policy in 1935. He testified:

> "Trial Examiner Norwood: Did you adopt any of those policies that your salesmen found in the field?
>
> The Witness: We adopted them but we haven't lived up to them strictly. I think that was the basis of my testimony.
>
> Trial Examiner Norwood: You lived up to them in some particulars and in some you did not?
>
> The Witness: Yes, sir; we varied from them as the circumstances arose."[1]

One problem which arose out of the April announcements was sales to commercial mixing plants and large concrete plants. Some manufacturers varied their practices to meet the demands of dealers.[2] Dealers' associations tried to limit such sales to cloth bags in order to restrict sales.[3]

The usual practice was to sell some of this trade direct and some through dealers,[4] but at least one company sold all direct.[5]

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[1] (R) Tr. 42331-32. See also: Moore, R. W., Vice President, Dewey (R) Tr. 47100.

[2]

Company	Date	Reference
Alpha	5/31/35	Com. Ex. 867-7 V, 7 W
Southwestern	4/25/35	Resp. Ex. 1757
West Penn	5/19/37	Com. Ex. 549-5 X

[3] Com. Ex. 2402: Letter dated July 2, 1935, MacQueen, National Federation of Builders Supply Associations to Members.

[4] Hawkeye: Manley, General Manager (R) Tr. 41805-08.
Medusa: Dawson, Vice President (R) Tr. 40183, 40466-68. Resp. Ex. 3158 E.
Monarch: Brooke, Vice President (R) Tr. 42329-31.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36564.

[5] Missouri: Alexander, President (R) Tr. 37266-67.

Some manufacturers did not adhere rigidly to their announced policies.[6] Others did adhere in order to maintain dealer good will.[7] Due to differences in interpretation, the practices of manufacturers have been different.[8]

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[6] Dewey: Moore, R. W., Vice President (R) Tr. 47100.
Diamond: Com. Ex. 1923.
Edison: Sweeney, Vice President (R) Tr. 35763.
Federal: Bates, J. E., Sales Manager (R) Tr. 30819-20.
Hermitage: McGovern, Sales Manager (R) Tr. 36278.
Medusa: Dawson, Vice President (R) Tr. 40183, 40466-68. Resp. Ex. 3158 E.
Missouri: Alexander, President (R) Tr. 37258, 37261-63, 37265, 37267, 37270-71, 37406-10.
Monarch: Brooke, Vice President (R) Tr. 42325-27.
National: Dannelly, Vice President (R) Tr. 39536-37, 39557-59.
Nazareth: Resp. Ex. 1615 A-B.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36532-33.
Cabanis, Sales Manager (C) Tr. 12733-34.
Peerless: Russell, Vice President (R) Tr. 34376-77.
Petoskey: Lucas, Vice President (R) Tr. 38718-19.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37941-42.
South Dakota: Hartley, Sales Manager (R) Tr. 41507-10, 41589-90.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 38958-59.
Southwestern (Ohio): Warren, G. E., Vice President (R) Tr. 29108 (WPA), 29082.
Volunteer: Lewis, Manager (R) Tr. 31690-91.

[7] Alpha: Coogan, Vice President (R) Tr. 23616-17.
Lehigh: Rader, Vice President (C) Tr. 12977-78.
Nazareth: Robeson, Vice President (R) Tr. 28314-17.

[8] Federal: Bates, J. E., *supra*, Tr. 30819-20.
Missouri: Alexander, *supra*, Tr. 37406-10.
Southwestern (Texas): Blair, W. R., *supra*, Tr. 38959.
South Dakota: Hartley, *supra*, Tr. 41507-10.

7. Preference for the Dealer Trade

Elcock, Vice President of Southern States, having identified an announcement of classification of business, made by the Company in 1935, was asked whether he was still operating under that announcement. Testifying to the fact that he did not allow the announcement to bind him and that he maintained an opportunist position, but would prefer to make all sales to dealers, he said:

"A. Oh, I think there are changes, several changes.

Q. Well, do you have any published announcement of that character? A. No.

Q. Since you have been with the company, has the company operated in accordance with some published announcement of that character? A. More or less, yes.

Q. Well, what do you do when there is a question of whether you are going to sell a certain kind of work direct or to a dealer,—how do you determine that? A. The benefit of my own company only; taking all factors into consideration.

Q. Well, what are some of the factors? A. What harm it may do with the dealer situation somewhere, what I think other people are going to do, try to guess them, and do what is best for my company.

Q. Why is it that you do not sell all of your cement direct and eliminate the dealer? A. I wish it could be reversed. I wish I could sell all of my cement through the dealer. I would very much prefer to have it that way.

Q. What is the reason for that practice? A. That is the steady day-to-day business that keeps you going. Contractors ship out in spurts and starts, go good one month and down the next month. I hope sincerely I will be able to so organize my business I will never have to touch a contract and have nothing but dealer business.

Trial Examiner Norwood: Contracts bring in some extra volume, do they not?

The Witness: You bet they do, Judge; you bet they do. They help you for a little bit, but there

is that inevitable lull after the contracts, and the dealer business comes in day to day. It does not take a lot of worry and sweat getting it. The contracts do.'"[1]

Hartley, Sales Manager of the state-owned plant in South Dakota, testifying on the sale of cement through dealers for state contracts said:

"Q. Well, take the State of South Dakota, if it submits an invitation to you for the purchase of cement, how do you handle it? A. Refer them to the dealer.'"[2]

8. Manufacturer and Dealer Meetings: March, April 1935

On March 16, 1935 E. E. Woods, Secretary-Manager of The Southwestern Lumbermen's Association, wrote Oklahoma:

[Italicized part quoted in Fdgs. Par. Seventeen (e)]

"In a general way, the attached statements sets forth what we believe the dealers in our general locality desire in the way of distribution of cement. *It is our understanding that there will be a meeting of the cement industry in Chicago next Tuesday. We attach herewith a purported declaration of what is being considered at this time by certain manufacturers. Believing that in its final analysis, these are matters that should be negotiated between the dealers and the manufacturers, and recognizing the fact that the Oklahoma Portland Cement Company has strongly favored a dealer policy, we trust the atti-*

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[1] (R) Tr. 37543-44.

See also: Elliott, Vice President, Whitehall (R) Tr. 28576.
Warren, F. B., Vice President, Bessemer (R) Tr. 32190-92.
Moore, R. W., Vice President, Dewey (R) Tr. 47075.
Hill, Vice President, Louisville (C) Tr. 13289, 13291.
Calvin, President, Aetna (R) Tr. 30163-64.

[2] (R) Tr. 41507.

tude of the Oklahoma Portland Cement Co. in this Chicago conference will be favorable toward maintaining a strong dealer policy.''[1]

On April 29, 1935, while the NIRA was still accepted as of legal effect, Phil Runion, Secretary of the Nebraska Lumber Merchants Association addressed a circular "To ALL CEMENT COMPANIES SERVING THIS AREA" in which he said:

[Italicized part quoted in Fdgs. Par. Seventeen (e)]

''We have been informed that the cement distribution policy developed in Chicago on March 19th has been accepted by the majority of the cement industry.

This Association is preparing to hold a series of group meetings throughout Nebraska beginning May 6, 1935. These meetings will be attended by at least 80% of the dealers in the State, and it is our intention to explain this policy in detail to the dealers in attendance.

We find that the dealers are desirous of knowing the cement companies who have accepted and announced this policy. With this thought in mind, we are writing all companies serving our territory, to forward to this office a copy of their announcement of this policy, or any individual policy under which they propose to distribute cement.

We would therefore, appreciate knowing the attitude of your firm regarding this policy, as quickly as possible.''[2]

Testifying concerning this meeting to which his circular referred, Runion stated that it was held at the Palmer House in Chicago and that about fifty persons were there, of whom perhaps 15% were manufacturers.[3] He was able

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[1] Com. Ex. 737-2 B.

See also: Com. Ex. 737-2 A.

[2] Com. Ex. 461.

[3] (C) Tr. 11998-99.

to recall one Hanson also representing the Nebraska Association, and one Lance representing Northwestern Lumber Dealers Association and one Dodson, a dealer from Minneapolis,[4] and perhaps one Gaines, secretary of the Michigan Lumber Dealers Association.[5] He was not sure whether Indiana and Wisconsin lumber dealers were represented.[6] Of the manufacturers present he could remember only Rader, a representative of Lehigh, and Rockwell, Sales Manager of Ash Grove.[7] The witness did not think there was a secretary of the meeting and described it as "a round table discussion, very informal."[8] No record of the meeting was kept, no committee appointed and no vote was taken. The witness could not remember who called the meeting.[9] However, as to the purpose of the meeting and its accomplishments, if any, the witness testified:

> "A. The object we retailers had in mind was the hopes that we can participate in the sale of all cement in the territories in which our dealers does business. That is our ambition, and the purpose of the meeting was to endeavor to sell these manufacturers of cement on that particular idea.
>
> Q. In the course of the discussion on that subject, did the question of a proper mark-up for the dealers come into the discussion? A. No, sir.
>
> Q. In the course of that discussion did the classes of business which the dealers thought should be handled by them and the classes which the dealers thought the manufacturers might handle direct come into the discussion? A. Yes, sir.
>
> Q. Did the dealers make progress in selling their

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[4] (C) Tr. 11994.

[5] (C) Tr. 11996.

[6] (C) Tr. 11995-96.

[7] (C) Tr. 11997, 12004.

[8] (C) Tr. 12010.

[9] (C) Tr. 12011.

ideas on the subject to the manufacturers? A. Not as satisfactory as we would have liked to have had it.

Q. Did you make some progress, though? A. I would say so.

* * *

By Trial Examiner Norwood:

Q. What was done? A. As I previously stated, our ambition in a meeting of that type was to secure as much as possible of the cement business in the areas in which dealers operated.

Q. Now, we are asking you what was accomplished towards those ends. A. We presented our proposition as to what we would like to have, which was all; we felt the dealers should participate in all of this business.

At that particular meeting, when I say progress was made, it was more our submitting what we would like to have. It was a general discussion of what our ambitions were along the lines of the selling of cement, and I could not say that progress was made, any definite progress was made at that particular meeting. We submitted our requests.

By Mr. Wooden:

Q. You mean that you submitted your requests for the consideration of the manufacturers? A. We submitted our requests to the manufacturers that we would like to participate in the sale of as much cement as we possibly could.

By Trial Examiner Norwood:

Q. Now, what did the manufacturers do about it? A. They took it under advisement at that meeting.

Q. Did you have any committees appointed, or anything like that? A. If there were any committees appointed at that time, I don't know. I was not serving on any of them.

Q. Any resolutions adopted? A. No, sir.

By Mr. Wooden:

Q. Were any committees appointed prior to the meeting to deal with the subject of the meeting, make

a report, or anything of that kind? A. Not to my knowledge.

Q. Did you discuss with the manufacturers on that occasion the specific classes of trade which you thought should be properly handled by the dealers? A. Yes, sir.

Q. Did the manufacturers shortly after this meeting send out announcements to their trade covering the subject matter that you discussed at the meeting?

* * * *

A. They later—later statements were received in our office from various cement manufacturers stating how they proposed to market their cement.

By Mr. Wooden:

Q. And are you aware whether or not they also sent such statements to their individual dealer customers?

* * *

A. Yes, to my own knowledge, there was a general circulation of this proposal, of how they proposed to market their cement, sent out to the trade."[10]

The witness then examined Universal Atlas' announcement of policy dated April 9, 1935,[11] and stated that this was an example of the sort of announcement which the companies made.[12] Emphasizing the inadequacy of this announcement from the standpoint of the dealers, Runion testified:

"Q. In what respects did it not represent what the dealers said they wanted at the meeting? A. We wanted all.

Q. I see. A. And all of these sections, where they proposed to do certain things which exempts the dealer from participating in the sale of cement is not satisfactory to us."[13]

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[10] (C) Tr. 12006-10.

[11] Com. Ex. 1903.

[12] (C) Tr. 12012.

[13] (C) Tr. 12017-18.

Runion was asked if there was any other meeting than the one of March 19th and stated that he thought there was such a meeting in Chicago probably a month later, but that he did not attend it.[14]

A. T. Hansen, Secretary of the Atlas Lumber Company, an operator of retail lumber yards in Nebraska and a member of the Nebraska Lumber Merchants Association, testified that he had attended a meeting of material dealers in Lincoln, Nebraska, at which Mr. Casdorf of the Hawkeye Company appeared. No other cement company was represented. The purpose of the meeting was to discuss "the matter of policy as to a sale, direct sale to consumer by the manufacturers or confining sales on types or orders to retail lumber dealers."[15]

The witness testified that he also attended two meetings in Chicago in 1935. He was positive that Mr. Runion was not present at either of these meetings,[16] but he recalled the presence of a number of retail dealers and representatives of dealers' associations. However, he was not aware that any were present as representatives of any dealer association. He stated:

> "A. Well, that question never came up, as to who represented what. It wasn't a reported meeting. There was no roll call, there were no minutes taken. It was an informal discussion."[17]

Hansen recalled the presence at these meetings of dealers from Wisconsin,[18] Minnesota,[19] and Michigan.[20] As to manufacturers present at one or the other of these meet-

[14] (C) Tr. 12034.

[15] (C) Tr. 12086.

[16] (C) Tr. 12088-89.

[17] (C) Tr. 12097.

[18] (C) Tr. 12094.

[19] (C) Tr. 12097-98.

[20] (C) Tr. 12100.

ings, Hansen testified that there were two representatives of Universal Atlas, a Mr. Rohwer and the other possibly Mr. Stone.[21] Rader of Lehigh was present at one meeting for a few minutes, possibly 10 or 15 minutes.[22] At the first meeting, (the one as to which Runion testified there were fifty persons present) Hansen recalled "about a dozen" and at the second meeting "probably twenty to twenty-five."[23] At the first meeting there were possibly four or five representatives of manufacturers. As to the purpose and outcome of the discussion at these meetings, Hansen stated:

> "*By Trial Examiner Norwood*:
>
> Q. Well, what was done? A. In order to explain what was done or was attempted to be done, it would be advisable, I think, to relate something of the circumstances leading up to the advisability for a meeting of this kind.
>
> Q. Go ahead and tell it. A. I don't want to make a speech from the witness stand.
>
> Q. Go ahead. A. The retail lumber dealers had felt constantly that in their field of activity of distributing cement to the ultimate consumer that they should be allowed to do so without being in competition with their source of supply, and that in that field it had been the practice and the policy of the cement manufacturers to recognize that right on the part of their dealers and customers, and the distribution had gone along rather smoothly for many years.
>
> With the advent of the difficulties following 1932 and 1933, and particularly with the coming on of the Codes, the relief programs, and things of that kind, there were types of jobs appearing in our state where there was a difference of opinion as to whether certain jobs should be sold by the retail lumber dealers, as for instance, relief and semi-relief jobs.

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[21] (C) Tr. 12098.

[22] Id.

[23] (C) Tr. 12100.

There was a tendency on the part of some of the cement manufacturers to want to sell those direct or bid them direct, over the objection of the retail lumber dealers, and that situation developed to the point where there was considerable difference of opinion as to what was the proper function and field of the retail dealer in relation to that, and so the meeting was called to try and compose those differences of opinion in that respect..

Shall I continue further?

By Mr. MacIntyre:

Q. What was done? Thank you. Will you please tell us what was done at the meeting that resulted in any composure of those differences, if anything of that nature was done? A: The practice of the cement manufacturers had been to sell direct to railroads. We, as retail dealers, questioned that right, but got nowhere with it.

The practice had also been of the cement manufacturers to sell direct to the established departments of the United States Government and in some localities direct to States, and we raised no objecjections to the sale of cement direct to the established departments of the United States Government, but we did object to a sale direct to the State or any subdivisions of the State government, and we strenuously objected to the sale by the—the direct sale by the manufacturers to those newly established agencies of the department, whether it was the Federal Government or the State, that were of the nature of relief jobs.

Q. Such as the WPA or PWA or CCC? A. Any of those, HOLC, and all the rest of them.

• • •

A. (Continuing) We knew, as did everyone else, of the large appropriations for relief work, and I knew for the Atlas Lumber Company, that we were as badly in need of relief as were the cement manufacturers who had been gaining a substantial increase of volume by the spending by the Federal Government of this money, and we felt that part of the spending, which was for relief purposes, and so long

as it was no less of a relief to the manufacturer if the retail dealer sold it, he would get his relief also, that the retailer should also participate in some of that relief.[24]

• • •

A. None of the representatives of cement manufacturers present at any of those meetings disputed the soundness of the position of the retail dealers with respect to the relief jobs, and were entirely in accord with the desire of their dealers and customers to make those sales.

By Trial Examiner Norwood:

Q. But state what was done in the meeting. A. When those differences were agreed upon or given as near an agreement as possible, it was left then that various manufacturers, those that were represented there, would draw their statements of distribution policy and send them to the—send them out to their customers.'"[25]

The witness further testifying as to the outcome of the meeting said:

"A. There was no provision or any discussion as to whether it was an enforceable thing, or anything of that kind, either upon the manufacture or upon the retail dealer."[26]

The policy of distribution was the only subject discussed.[27]

The witness felt sure that he had attended both meetings before he received the April announcements of policy.[28] Referring to the witness' testimony that those present at the meeting agreed, Hansen testified:

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[24] (C) Tr. 12101-04.

[25] (C) Tr. 12105.

[26] (C) Tr. 12109.

[27] (C) Tr. 12110.

[28] (C) Tr. 12128.

"Q. They [the manufacturers] said they thought there was justice in what you were contending for? A. That is right.

Q. And isn't that what you meant when you said that they agreed? A. Exactly, that is what I meant when I said we were composing our various opinions on what constituted a fair distribution of cement by the retailers."[29]

In a letter to Flint, Secretary of the Mountain States Lumber Dealers Association, Hansen wrote a year later:

"For your convenience, I am attaching hereto a copy of the distribution policy which was adopted about a year ago applicable to the entire Northwestern Association territory, the Southwestern Association territory and to Nebraska. The copy enclosed is the one prepared by the Monarch Cement Company, of which I happen to have two copies. You may keep this in your files.

This program was adopted after several conferences in Chicago which I had the privilege of attending. It undoubtedly was the best and apparently the only one upon which the dealers and the manufacturers could then agree. The general thought in the whole thing was that dealers could not participate in the large paving programs outside of cities and towns; could not sell large quantities of cement to established departments of the Federal government; but could and should participate in sales to any department of the State or Federal government that was temporary in nature or largely for relief purposes and could and should participate in all construction located within cities and towns."[30]

Cabanis, the Sales Manager of Northwestern States, whose only mill was located at Mason City, Iowa,[31] testified that he attended a meeting at the Palmer House in Chicago

[29] (C) Tr. 12130.

[30] Com. Ex. 1906.

[31] (C) Tr. 12621.

where the manufacturers' sales policies were discusesd with dealers. He did not think Mr. Hansen was there, or Mr. Runion. He saw Rader, of Lehigh there, Rohwer of Universal Atlas and Fellows of Alpha. These were the only manufacturers besides himself that he could remember. He did not think there were manufacturers there whom he did not remember.[32] The witness did not know who called the meeting but he heard of it through Weaver or Dobson of the J. F. Anderson Lumber Company in Minneapolis who advised him that he would be interested in the meeting and so he attended it.[33] When asked to identify a paper called "Methods of Marketing Cement"[34] as representing the product or outcome of that meeting, the witness was unable to do so. He testified:

> "A. No, I didn't listen in on that meeting, as a matter of fact.
>
> Q. You mean you attended the meeting and didn't hear what was going on? A. I was there for about two hours.
>
> Q. And you don't know what was going on during that time? A. Well, I know that they had,—some dealers had some different things to put up to the manufacturers but——
>
> Q. Things like involved in this paper? A. Well, for instance, emergency relief. We hadn't sold any emergency relief work except through dealers anyway, so I wasn't particularly interested in it."[35]

Rader, Vice-President of Lehigh, questioned about this meeting, testified:

> "A. I recall there was a meeting or two. I don't recall very much about it and I don't know the dates.

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[32] (C) Tr. 12656-57.

[33] (C) Tr. 12658-59.

[34] Com. Ex. 2220 A-F, *infra*, p. 2357-68.

[35] (C) Tr. 12721.

Q. Will you tell us what you recall of any such meetings? A. Well, along in February, after we sent out our selling policy to the dealers there were some meetings where dealers asked me to meet them. They were criticizing our selling policy.

Q. In what respect? A. Well, in several respects; in the quantity of cement that we were selling direct, the way we were selling it. We had quite some arguments about it.

Q. Were they criticizing your selling policy on the ground that you were selling WPA business direct? A. No, I wouldn't—I couldn't say just what business. You understand the dealer naturally has always wanted to handle all of our cement. They don't want us to sell anybody else, and we tried to strike a medium between government——

Q. Well, what classes of trade were you selling direct that dealers didn't want you to sell direct? A. At that time?

Q. Yes. A. I don't recall for sure just what the classes were at that time."[36]

As to who were present and why he was there, Rader testified further:

"Q. Do you remember who else among the manufacturers or representing manufacturers were in attendance at that meeting? A. No, I don't remember specifically. First, those dealers asked me to meet them. They were criticising my policy, or our sales policy, I mean, and arguing with me as to what I should and should not sell direct.

Q. Were they criticising Lehigh's policy any more than they were the policy of other manufacturers? A. They were only criticising Lehigh's policy to me.

Q. Do you recall other manufacturers of cement being represented at the meeting that you attended at which dealers were represented? A. There was more than one of those meetings, and they are so long ago, and so confused that I haven't much recollection of just who was there. I think at one time I

[36] (C) Tr. 12963-64.

tried to get them to invite some of the other manufacturers.

Q. Did they invite them? A. I rather imagine they did. I was trying to get some responsibility off of myself.

Q. Did you suggest any of the manufacturers to be invited? A. I don't think so. I just merely probably made the statement, 'Why do you pick on me all the time? There are other people in this business.' "[37]

Fellows, the Western Sales Manager of Alpha, testified that he was present at those meetings in Chicago, that one meeting was merely a continuation of the other and that he could not remember who was present at which meeting, but that he recalled seeing Rader of Lehigh and Cabanis of Northwestern and either Rohwer, Cronkrite or Stone of Universal Atlas, and DeCamp, the Chicago Sales Manager of Medusa.[38] He could recall no one present from Lone Star or Penn Dixie. Alpha heard of the meeting from a dealer in Minnesota.[39] Concerning the purpose, nature and outcome of the meeting, Fellows testified:

"A. Just shortly previous to the calling of that meeting, or some time previous to that, there had been announcements—we had sent an announcement out of a sales policy, or dealer policy. Other competitors had done the same thing. And this meeting was called by—I don't know who it was called by—I don't know who it was called by—but there were secretaries of various dealer organizations, some outstanding individual dealers, cement manufacturers, and so forth.

They met there and the dealers and the secretaries of the dealer organizations spoke about the plans that had been broadcast, sent out to the trade, and criticized those plans,—just told us their side

[37] (C) Tr. 12970-71.

[38] (R) Tr. 25940-41.

[39] (R) Tr. 25941-42.

of the story as to how it did not fit in with their picture, and so forth, and they were in hopes that some change could be made whereby they could participate to a greater extent in the business in their different localities.

Individual associations' secretaries got up and expressed how they themselves felt about their plans, and also stated as to how their member dealers had expressed themselves in opposition to the plan.

Q. Do you recall now at this late date what it was these dealers wanted, Mr. Fellows? Have you in mind anything as to that? A. Well, the dealers in voicing their opinion and their criticism of these policies, their objection to these policies, was that there was certain business being taken away from them, that is, in which they were not participating. There were certain classifications made that would be sold direct, and that is what they were objecting to. In other words, they wanted—their whole criticism was that they wanted to handle all of the cement business in their particular localities.

Q. Well, as the result of the meeting, was there any indication that manufacturers would or would not act in any certain way because of this discussion? A. No, there was not. They didn't—there didn't seem to be anything like that called for in the objections that these dealers made. They simply presented their side of the story hoping something might be done to take care of it to their satisfaction. The fact that there wasn't anything done I think is indicated due to the fact that some time later, two or three weeks later—I don't remember just how long—there was another similar meeting held with some of the same secretaries and some additional secretaries, at which time they again stated their objections.

Q. Well, before we get to that one: As the result of this first meeting, did you, yourself, or your company, take the slightest action of any kind as a result of this meeting? A. No, I don't believe we took any action. I have no recollection of our taking any action at all after that meeting.

Q. Now, coming down to this other meeting you have just mentioned, when was that? A. Why, it

was shortly after this first meeting. I don't know just how long after that was, a week or ten days, maybe two weeks. It followed very shortly, however.

Q. Do you recall, Mr. Fellows, what happened at that meeting? A. It was a reiteration, practically, of the criticisms and objections they had to the plans that had been sent out by the various cement companies, almost practically a repetition of the first meeting.

Q. Was any action taken at that meeting of any kind as to what you or other cement manufacturers should do? A. No, sir.

Q. In the future? A. No, sir.

Q. And after it was over, did you, personally, or your company, take any action of any kind as a result of the meeting? A. No, sir."[40]

Having his attention returned to the subject at the close of his testimony, Fellows testified that there was no definite outcome of this meeting and no commitment undertaken by any manufacturer present.

"Q. Was any suggestion made that some proposals be reduced to writing? A. No, sir. I recall no such instance at all.

Q. Were any minutes made of those meetings? A. Any what?

Q. Any minutes kept of those meetings, or made? A. I don't think so; I didn't see any being made.

Q. Who presided? A. Well, there didn't seem to be any—it was a decidedly informal meeting, and there didn't seem to be any secretary, or anything like that, or anyone definitely presiding. There was one party who took considerable part in the discussion and called upon certain other dealers——

• • •

Q. I didn't say 'dealers.' Did the various manufacturers state their views, other than Mr. Raeder? A. Not that I recall.

Q. He is the only one you recall? A. Yes, sir.

[40] (R) Tr. 25816-19.

Q. How long did these two meetings at Chicago with the dealers,—how long did they last?

* * *

A. My recollection is that the first meeting, I think we assembled along about 10:30 or 11 o'clock, and some of them had lunch together, and then the next one, after luncheon——

Q. Did you have lunch? A. Yes, I stayed for lunch, got a free lunch, as far as that is concerned, and the next meeting was held the same way, in the morning, but, as I recall, there was no lunch attached to that, and that was the end of that meeting.

Q. Wasn't anything definitely determined at the meetings at all? A. There was nothing definite. There didn't seem to be any call for anything like that. These dealers were just voicing their dissatisfaction with the policies that had been put out.'"[41]

Reiter, who was at the time of these meetings Chairman of the Code Authority, testified that he knew of no Code Authority meetings in Chicago during March and April 1935 in which representatives of dealers and manufacturers discussed classes of trade.[42] Various manufacturers trading in the midwest area denied participating in these meetings.[43]

Hoenig, Sales Manager of Nebraska writing to Professor Burns on July 26, 1935 and describing the issues which had caused confusion between manufacturers and dealers

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[41] (R) Tr. 25947-49.

[42] (C) Tr. 17115.

[43] Koch, Vice President, Lone Star (R) Tr. 33243.
Horner, President, Kosmos (R) Tr. 36820.
Alexander, President, Missouri (R) Tr. 37270-71.
Dannelly, Vice President, National (R) Tr. 39559.
Colburn, Vice President, Marquette (R) Tr. 39983.
Dawson, Vice President, Medusa (R) Tr. 40392-93.
Hoenig, Sales Manager, Nebraska (R) Tr. 42071.
Warren, G. E., Vice President, Southwestern (R) Tr. 29382-83.

and which had been the subject of these meetings in Chicago, wrote:

> "From the time that the Cement Industry began to establish its policy of selling direct to the Government and to contractors for highway and certain other work, designated in the Code under the NRA, dealers began to feel that they were being deprived of business that should have been sold through their established places of business. They claimed that they had substantial investments for the distribution of building and construction materials in plants located over the territory, that they had been and still were the logical distributors of cement and other building construction materials, and that they should have control of the sale of such materials, and enjoy a reasonable profit from their sale.
>
> The Government on the other hand, was taking a firm stand that it was a purchaser in a class by itself and spending large sums for the purpose of stimulating employment and generally rehabilitating our economic structure, and as such has the right to buy independent of the dealer.
>
> Dealers, not understanding the position of the Industry, were blaming local cement companies for not seeing that they, the dealers, handled such sales, held local companies responsible for policies prevailing nationally under the Code, and in retaliation resorted to boycott, to placing business where the nets would be as low as possible, and resorted to every means individually and collectively to influence a change in selling policies. This ended only after lumbermen and cement men got together nationally and convinced the dealers of the Country that the Cement Industry was not entirely accountable for the selling policies it was following. Misrepresentation of the Code caused much confusion also. Some companies sold directly properly, while others quoted on the same work with dealer protection, when they should have quoted direct. Dealers could not understand or forgive such procedure. Furthermore some situations arose that in their interpretation seemed to be unfair to dealers, and

even ridiculous to some members of the Industry. There is still room for improvement."[44]

Commenting apparently on the Chicago meetings, Runion, Secretary of the Nebraska Lumber Merchants Association, wrote to Flint, Secretary of the Mountain States Lumber Dealers Association on March 2, 1936:

[Italicized part quoted in Fdgs. Par. Seventeen (e)]

"I am rather surprised at your letter regarding cement distribution, for this reason—I was under the impression that the cement distribution statement which was worked out nearly a year ago, was applicable to the entire United States.

Our Trades Relation Committee as well as the Southwestern and Northwestern's Committees, sat in with the heads of the cement industry and worked out a cement distribution statement, copy of which is enclosed. I might say that this is the accepted distribution statement used by all cement companies in the Central Middlewest.

Under this market policy which is self explanatory, it is accepted that the dealer shall receive 15¢ per barrel profit on any cement sold thereunder.

If I am not mistaken, there are some things in Colorado which you participate in beyond this statement, and I faintly recall someone telling me that it was the thought in Colorado to continue under the present set up as it is more advantageous than the cement distribution statement enclosed.

[Italicized part quoted in Fdgs. Par. Seventeen (e)]

You will be interested in knowing that since this statement was adopted, April 30, 1935, there is no record of any cement company having violated it in their transactions. I regret to say that we cannot say that much for our retail dealers.

Outside of our metropolitan areas, the statement has worked excellently. Unfortunately, the dealers in Omaha and Lincoln have seen fit to make a football out of it and have given away their profits. I am informed the same thing exists in Chicago and the Twin Cities."[45]

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[44] Com. Ex. 967-17 U.

[45] Com. Ex. 1904 A, B.

9. "Method of Marketing Cement": May, 1935

Scovel, Assistant Vice President of Universal Atlas in its Chicago office, testified that he had been in business with the company or its predecessor since 1909.[1] He identified a paper as "A Method of Marketing, Texas" which was drafted in his office and distributed for the use of Universal Atlas' sales force in Texas.[2] He testified that he had also prepared a document of similar nature for the use of Universal Atlas' sales organization in all parts of the country outside of Texas.[3] As to the sources which the witness used in the preparation of this circular to the sales force and the reasons for its preparation, Scovel testified:

> "A. It was prepared from several sources of information. It wasn't anything that occurred all of a sudden. It was from my knowledge of the business and the practices that had been employed in selling cement over a period of years. It was Section 11 in the Code, whichever was used, and I believe some of the announcements to the trade. Certainly, the announcement to the trade that we sent out on April 9th, which was a month and a half or so before this policy, this method of marketing was prepared——
>
> Q. In Texas? A. No, not in Texas. You are asking me about the one other than in Texas.
>
> Q. Yes.
>
> *By Trial Examiner Norwood:*
>
> Q. Were some of the announcements by other companies and by the Institute? A. No.
>
> Mr. Zimmerman: If the Examiner please, there was never an announcement by the Institute.
>
> Trial Examiner Norwood: I am asking him if there was.
>
> The Witness: No.

[1] (C) Tr. 13102.

[2] Com. Ex. 1942 A-E; (C) Tr. 13127-28.

[3] (C) Tr. 13129.

By Trial Examiner Norwood:

Q. Announcements by whom? A. Our own published sales policy sent to the trade.

Q. I see. A. Ever since Section 11—when Section 11 was taken out of the Code,[4] there was a great deal of work being done in revising Section 11, and to get a Section 11, or something similar to that put back into the Code. It is pretty hard to sell cement if you don't have some sort of a statement of policy, a method of marketing, whether it is in a shape like that, or something else. Within a week after Section 11 was taken out of the Code, our files in the office show that there was a statement set down with regard to how we were going to sell our cement.

Q. That was—— A. That was after January 30th, 1934, within a week or so after General Johnson took Section 11 out of the Code.

Q. But in 1935 it was the fact, was it not, that you somewhat enlarged the classes of business that the dealers would handle after dealers made representations to you that it should be done? A. Well, I think that is possible. I don't recall now just the variations of the different sales policies that were in effect from, oh, even before the Code, even public announcements that we had sent out as early as 1931; I don't recall all of those differences. It is pretty hard to analyze a thing like that, unless you lay them down side by side and do it."[5]

Later Scovel produced a copy of this paper and it was introduced in evidence.[6] The authority for this method of marketing cement was long established practice by the company. The witness testified:

"Q. As I understand it, you made up this statement, which is marked 2359 A to F, inclusive? A.

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[4] *Supra*, p. 2302-07.

[5] (C) Tr. 13132-34.

[6] Com. Ex. 2359 A-F.

Well, I set up the lay-out, and divided the lay-out or made up the lay-out which, as I say, was an analysis of the method of marketing. The practice has been in effect for a long time.

Q. Is the language of the statement of your composition? A. Well, not entirely, no.

Q. Can you state—— A. I had suggestions from people in our office with regard to this.

Q. Will you state who in your organization assisted you or made any suggestions regarding the contents of that paper? A. Well, I don't know. The thing was discussed around with people in the office here, and we may have even had some suggestions in from outside offices.

Q. I was going to ask you whether you had any suggestions submitted, or if you considered any suggestions from other cement companies. A. Branch offices probably did send in some suggestions, because this thing was sent out to them.

Q. Did you have any suggestions from competitive cement companies about it? A. No, I think with regard to this, this is the final proof, but I don't recall—this thing has been in use since—since this thing has been in use I haven't had any suggestions of any kind. There have been changes, as I say, in it, but——

Q. I am speaking now of its original compilation and preparation, whether you had suggestions from other cement companies regarding it. A. Well, I don't know. We may have discussed it at times, when I bumped into somebody, but there is nothing formal about it, nothing of a formal nature of the discussion of it.

Q. Did you have some informal discussion? A. Well, I think there was some.

Q. With whom? A. Well, I think that there was some discussion, informal groups that discussed this here in Chicago.

Q. Who were in the group you refer to? A. Well, the group that I refer to, my recollection is that—I think Mr. Rohwer was there, and I think that a man from the east, I think his name is Bragg——

Q. Who was he? A. I don't recollect what company. I think it is the Alpha Company. I am not sure. And I think Mr. Calvin was there.'"[7]

The witness could not recall any other persons present in Chicago with whom he discussed this matter. He testified further:

"Q. Was it understood that you would prepare a statement of the matters that you discussed at that group gathering? A. Why I don't know that it was—I don't recall whether there was any definite understanding that I would do it, but I think I did do it.

Q. And is that paper that you hold in your hand, Exhibit 2359 A to F, inclusive,—is that the result or does that embody what you did after having that discussion with that group? A. Well, I don't know about every individual item.

Q. Well, whether every individual item or not, what is your answer with any qualification you want to make? A. I would say that some of it is.

Q. Did you have help from any others in that group in the preparation of the statement? A. No.

Q. Did you submit the results of your labors to others in the group? A. Well, my recollection is that they got some copies of this.

Q. Who got some copies? A. Those that were in the group. We may have sent some of them to some of the companies right in Chicago. There is no secret about it, the lay-out of this thing, because it was——

Q. Who sent the copies to some of the companies in Chicago? A. Why, I don't know. I may have sent some; some of our other people—some of our branch offices may have sent some of those out.

Q. Was there anything of that character such as represented by Exhibit 2359 A to F, inclusive, that was in circulation prior to the date indicated on 2359 F, namely, May 28, 1935? A. Prior to this?

Q. Yes. A. Well, I think there was an earlier

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[7] (C) Tr. 13175-77.

draft of this thing. There was an earlier draft of this——

Q. Did you prepare the earlier draft? A. Not this final draft.

Q. Did you prepare the earlier draft? A. Yes, I prepared the earlier draft.

Q. And did you submit that earlier draft to the consideration of these other people that you have—— A. That is the one I mean. This is the final—this is the final thing that we prepared.

Q. When you say 'we'—— A. Well, I mean that I prepared it.

Q. You prepared it? A. In our office.

Q. After having this group discussion? A. It was after the group discussion.'"

As to the distribution of this circular, Scovel testified:

"Q. Do you think, then, that you sent copies of your statement to the other companies that had representatives at this group discussion? A. Well, I may have done it. As I say, they may have known something of this. It was no secret. They may have asked for copies of that.

Q. Were you aware that other companies did use the same form of statement of method of marketing cement that is represented in the statement that your company used? A. No, I wasn't particularly aware of it. Some of them may have copied it or used it as their way of doing business. I don't know. I have no knowledge, definite knowledge that they did.

Q. Did you attend a meeting in Chicago attended by representatives of dealers' associations at which the subject covered by your method of marketing cement statement that you have in your hand was discussed? A. No, sir.

Q. How did you come to prepare such a statement? Did somebody instruct you or suggest it to you or did you volunteer it? A. Well, it was just—I don't know how I personally came to prepare it. I have said before, we have had a method of market-

(1) Tr. 13178-80.

ing, sales policy, and a method of marketing for a long time, and this was brought into existence to put it down in a handy way after we issued our policy of April 9, 1935.

. . . .

Q. Were you aware of any general distribution of that form and substance of a statement of marketing method of cement in the trade? A. No, sir."[9]

This paper reads as follows:[10]

"METHOD OF MARKETING CEMENT

The method of marketing cement to the following buyers and classes of work shall be that specified herein for each class:

Buyers and Classes of Work	*How to Sell*
1—UNITED STATES GOVERNMENT WORK:	
(a) Purchases of Govt. agencies (except Federal emergency or unemployment relief agencies), regardless of character of purchases and location of work:	Sell DIRECT, under specific sales contract, for period named in Govt. invitation; or for 15 days' delivery.
(b) Purchases by Federal emergency or unemployment relief agencies, regardless of character of purchases and location of work:	Sell thru DEALER. If dealer has written order on Govt. form, sell under specific sales order or contract, for period named in Govt. form; otherwise sell for 15 days' delivery.

[9] (C) Tr. 13180-81.

[10] Com. Ex. 2359.

Buyers and Classes of Work	*How to Sell*
1—UNITED STATES GOVERNMENT WORK *(Continued)*	
(c) Purchases by contractors for work awarded by Govt. agencies (except Federal emergency or unemployment relief agencies), regardless of character of purchases. If work is:	
(1) Located entirely within cities, towns or villages:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(2) Located entirely or partly *outside* of cities, towns or villages:	Sell DIRECT, under specific sales contract, for period required for completion of work; or for 15 days' delivery.

NOTE: Federal emergency or unemployment relief agencies do NOT award work to contractors.

2—STATE GOVERNMENT WORK:	
(a) Purchases by State agencies (except State and Federal emergency or unemployment relief agencies and State institutions) for highway pavements and grade crossing elimination projects, regardless of character of purchases and location of work:	Sell DIRECT, under specific sales contract, for period named in State invitation, or for 15 days' delivery.

Buyers and Classes of Work.	*How to Sell*
2—STATE GOVERNMENT WORK (*Continued*)	
(b) Purchases by State agencies (except State and federal emergency or unemployment relief agencies and State Institutions) for work *other* than highway pavements and grade crossing elimination projects, regardless of character of purchases and location of work:	Sell thru DEALER. If dealer has written order on State form, sell under specific sales order or contract, for period named in State form; otherwise sell for 15 days' delivery.
(c) Purchases by State and Federal emergency or unemployment relief agencies and State Institutions for any work whatever, regardless of character of purchases and location of work:	Sell thru DEALER. If dealer has written order on State form, sell under specific sales order or contract, for period named in State form; otherwise sell for 15 days' delivery.
(d) Purchases by contractors for highway pavements and grade crossing elimination projects awarded by State agencies (except State and Federal emergency or unemployment relief agencies and State Institutions.) If work is:	
(1) Located entirely *within* cities, towns or villages:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
2—STATE GOVERNMENT WORK (*Continued*)	
(2) Located entirely or partly *outside* of cities, towns, or villages:	Sell DIRECT, under specific sales contract, for period required for completion of work; or for 15 days' delivery.
(e) Purchases by contractors for work awarded by State agencies (except State and Federal emergency or unemployment relief agencies and State Institutions) *other* than highway pavements and grade crossing elimination projects, regardless of character of purchases and location of work:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(f) Purchases by contractors for State Institution work of any kind whatever, regardless of character of purchases and location of work:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
NOTE: State and Federal emergency or unemployment relief agencies do not award work to contractors.	
3—COUNTY WORK	
(a) Purchases by Counties for highway pavement contracts and bridge, culvert and repair work *awarded as part of* highway pavement contracts, regardless of character of purchases and location of work:	Sell DIRECT, under specific sales contract, for period named in County invitation; or for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
3—COUNTY WORK (*Continued*)	
(b) Purchases by Counties for work *other* than highway pavement contracts and bridge, culvert and repair work awarded as part of highway pavement contracts, regardless of character of purchases and location of work:	Sell thru DEALER. If dealer has written order on County form, sell under calendar quarterly requirement contract; otherwise sell for 15 days' delivery.
(c) Purchases by contractors for highway pavement contracts and bridge, culvert and repair work *awarded as part of* highway pavements, regardless of character of purchases. If work is:	
(1) Located entirely *within* cities, towns or villages:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(2) Located entirely or partly *outside* of cities, towns or villages:	Sell DIRECT, under specific sales contract, for period required for completion of work; or for 15 days' delivery.
(d) Purchases by contractors for work *other* than highway pavement contracts and bridge culvert and repair work awarded as part of highway pavement contracts, regardless of character of purchases and location of work:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
4—Railroad Work	
(a) Purchases by railroads filing tariffs with State or Interstate Commissions, regardless of location of work. If purchase is for:	
(1) Specific Work: (Note: Cement purchased under specific work contracts shall not be shipt to any town other than that provided in the contract nor shall it be diverted for use in general repair or maintenance work.)	Sell Direct, under specific sales contract, for period not to exceed one (1) year from date of contract; or for 15 days' delivery.
(2) Maintenance work:	Sell Direct, under calendar quarterly requirements contract; or for 15 days' delivery.
(b) Purchases by contractors for specific work awarded by railroads filing tariffs with State or Interstate Commissions. If work is:	
(1) Located entirely *within* cities, towns or villages:	Sell thru Dealer, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
4—RAILROAD WORK (*Continued*)	
(2) Located entirely or partly *outside* cities, towns or villages:	Sell DIRECT, under specific contract, for period required for completion of work; or for 15 days' delivery.
NOTE: Railroads do not award contracts for maintenance work.	
(c) Purchases by railroads not filing tariffs with State or Interstate Commissions and by contractors for work for such railroads:	Sell as specified under '10-Owner Industrial and Public Utility Work.'
5—I—WATER SUPPLY DEVELOPMENT WORK:	
(a) Purchases by Owners (except cities, towns or villages) when work is:	
(1) Located *within* or *local* to cities, towns or villages such projects *are designed to serve.*	Sell thru DEALER for 15 days' delivery only.
(2) Located *outside* of and *not designed to serve* cities, towns or villages local to such projects:	Sell DIRECT, under specific sales contract, for period required for completion of work; or for 15 days' delivery.
(b) Purchases by Cities, Towns, or Villages:	See '9—City, Town or Village Work.'

Buyers and Classes of Work	*How to Sell*
5—I—Water Supply Development Work (*Continued*)	
(c) Purchases by Contractors for projects awarded, regardless of ownership, when work is:	
(1) Located *within* or *local* to cities, towns or villages such projects *are designed to serve.*	Sell thru Dealer, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(2) Located *outside* of and *not designed to serve* cities, towns or villages local to such projects:	Sell Direct under specific sales contract, for period required for completion of work; or for 15 days' delivery.
II—Large Waterpower, Flood Control and Irrigation Work:	
(a) Purchases by Owners (except cities, towns and villages) when work is:	
(1) Located entirely *within* cities, towns or villages:	Sell thru Dealer for 15 days' delivery only.
(2) Located entirely or partly *outside* of cities, towns or villages:	Sell Direct, under specific sales contract, for period required for completion of work; or for 15 days' delivery.
(b) Purchases by Cities, Towns or Villages:	See '9—City, Town or Village Work.'

Buyers and Classes of Work	*How to Sell*
II—Large Waterpower, Flood Control and Irrigation Work (*Continued*)	
(c) Purchases by Contractors for projects awarded, regardless of ownership, when work is:	
(1) Located entirely *within* cities, towns or villages:	Sell thru Dealer, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(2) Located entirely or partly outside of cities, towns or villages:	Sell Direct, under specific sales contract, for period required for completion of work; or for 15 days' delivery.
6—Contractors:	
Note: Purchases by Contractors to be made as and where specified under the class of work.	
7—Manufacturers of Concrete and Cement Products:	
(a) Purchases consumed exclusively in the manufacturing operations of concrete and cement products (except purchases for concrete pipe and concrete pile manufactured for *specific work*):	Sell Direct or thru Dealer under calendar quarterly requirement contract; for 15 days' delivery.
(b) Purchases by concrete pipe and concrete pile manufacturers for pipe	Sell Direct, under specific sales contract for period required for com-

Buyers and Classes of Work	*How to Sell*
7—MANUFACTURERS OF CONCRETE AND CEMENT PRODUCTS (*Continued*)	
or pile manufactured for specific work which can be definitely checked for quantity and location:	pletion of work. (Such specific contracts should be confined to public work awarded by contract where the cement requirements can be accurately figured.)
(c) Purchases by concrete pipe manufacturers on orders held by them for the year's requirements of a City, County, State, Industrial or Contractor. (Such orders shall not constitute specific work.)	Sell DIRECT or thru DEALER under calendar quarterly requirement contract; for 15 days' delivery.
8—COMMERCIAL CONCRETE MIXING PLANT:	
(a) Purchases by commercial concrete mixing plants at their regularly established places of business, for their own processing operations but not for resale:	Sell DIRECT under same terms and conditions as dealers.
9—CITY, TOWN OR VILLAGE WORK:	
(a) Purchases by Cities, Towns or Villages, regardless of character of purchase or location of work:	Sell thru DEALER. If dealer has written order on City, Town or Village form sell under calendar quarterly requirement contract; otherwise sell for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
9—CITY, TOWN OR VILLAGE WORK (*Continued*)	
(b) Purchases by Contractors by Cities, Towns or Villages, regardless of location:	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.
(c) Purchases by Contractors for *other* than specific work awarded by Cities, Towns or Villages, regardless of location of work.	Sell thru DEALER for 15 days' delivery.
10—OWNER, INDUSTRIAL AND PUBLIC UTILITY WORK:	
(a) Purchases by Owners (except for Water Supply Developments and large Waterpower, Flood Control and Irrigation projects), Industrials, Public Utilities and Railroads (not filing tariffs with State or Interstate Commissions), regardless of character of purchases and location of work:	Sell thru DEALER for 15 days' delivery.
(b) Purchases by Contractors for specific work by Owners (except for Water Supply Development and large Waterpower, Flood Control and Irrigation projects), Industrials,	Sell thru DEALER, under specific sales order or contract, for period required for completion of work; or for 15 days' delivery.

Buyers and Classes of Work	*How to Sell*
10—Owner, Industrial and Public Utility Work (*Continued*)	
Public Utilities and Railroads (not filing tariffs with State or Interstate Commissions), regardless of location:	
(c) Purchases by Owners and/or Contractors for Water Supply Developments and large Waterpower, Flood Control and Irrigation projects:	See '5—I Water Supply Developments and 5—II Large Waterpower, Flood Control and Irrigation Projects.'
II—Miscellaneous Work:	
(a) Purchases not specifically covered in foregoing classes of buyers or work, regardless of character of purchases or location of work:	Sell thru Dealer for 15 days' delivery."

Royal, an attorney for the Federal Trade Commission, identified a copy of the foregoing exhibit and testified that it had come from the files of Northwestern States and that he had received it from Cabanis, Sales Manager of that company in November, 1936, and that at the time Cabanis told him "it was a paper gotten up through an understanding with dealers as to which class of customers the manufacturers would sell and which class the dealer should be allowed to sell."[11] Cabanis produced a similar circular[12]

[11] (C) Tr. 12538.

[12] Com. Ex. 2220 A-F.

dated "5/28/35" which he had found on his desk upon his return from a trip sometime in 1935.[13]

Sutherland, Assistant Vice President in charge of sales for Universal Atlas, testified in detail concerning the provisions of the "Method of Marketing Cement" that they did not represent any new practice by the company but were merely the statement of practices which were either in effect at the time or had originated earlier and which, for the most part, had been followed by the company for many years.[14] Subsequent to its issue the company had made variations in its practices.[15] The company recognized no obligation to follow its sales policies as announced in February and April, 1935, or the methods set forth in "Method of Marketing Cement." The witness denied any understanding, agreement or contract with any other manufacturer or with any other person to follow the practices stated.[16]

Rader, Vice President of Lehigh, testified that a copy of the "Method of Marketing Cement"[17] resembled in form a statement that he had seen and which he thought was a set of Code interpretations issued in December, 1933 and January, 1934 interpreting Article XI,[18] brought to his attention by an official of Consolidated.[19] The witness had no direct knowledge that other companies used this statement of the division of classes of trade.[20]

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[13] (C) Tr. 12719.

[14] (R) Tr. 35363-85.

[15] (R) Tr. 35388.

[16] (R) Tr. 35387-88.

[17] Com. Ex. 1905 A-F.

[18] (C) Tr. 12982.

[19] (C) Tr. 12984.

[20] (C) Tr. 12987-88.

On July 16, 1935 Neylan, Assistant General Sales Manager of Lone Star, addressed a letter to all the subsidiary companies as follows:

> "Referring to our letter of July 2nd to which was attached memorandum entitled 'Method of Marketing Cement'.
>
> Inasmuch as the method outlined in the memorandum seems to have met with general approval, it is our desire that the plan be placed in effect in your respective territories at once, if you have not already done so."[21]

It does not appear from the evidence as to where Neylan obtained the memorandum he enclosed or what it contained or in what respects, if any, it resembled the "Method of Marketing Cement" issued by Scovel. There were in all 8 copies of the "Method of Marketing Cement" offered in evidence and several of these varied in detail from the others.[22]

10. The Knoxville Meeting: July, 1935

On July 17, 1935, the members of the Sixth District of the Institute held a meeting at the Farragut Hotel in Knoxville, Tennessee. The minutes report the presence of Reiter, Chairman of the Trade Practice Committee of the Institute, and 28 persons representing 13 different manufacturers.[1]

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[21] Com. Ex. 2426.

[22] Com. Exs. 1905, 2197, 2220, 547-4 D-4 J, 2266, 2427, 2385, 2359.

[1] Coogan and Postelle for Alpha;
Monday and Dalby for Cumberland;
Storey, Traynor and Hjerpe for Florida;
Nicholson and Dannelly for Georgia;
Monday and McGovern for Hermitage;
Bowen and Houser for Lehigh;
Neylan and Johnston for Lone Star;
Nicholson and Dannelly for National;
Wing, Sellinger, Wilkerson and Baker for Penn-Dixie;

The minutes[2] are signed by Monday, as Chairman, and Hjerpe, as Secretary, and make no reference to "Methods of Marketing Cement" or to any discussion of the classification of trade.

However, under date of July 24, 1935, Monday wrote to the sales managers of various companies[3] stating that he enclosed 3 copies of "Methods of Marketing Cement" and 3 copies of Interpretations in connection with Section 2 thereof relating to State Government work, and adding:

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

"These Plans and Interpretations were unanimously concurred in by all members of the Southeastern District and approved at the meeting held in Knoxville on Wednesday, July 17, 1935."

Several of those who were present were examined, and no one of them could recall any discussion concerning "Methods of Marketing Cement" or any approval of it at the meeting.[4] A number who attended the meeting re-

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White and Elcock for Southern States;
Storey, Conkling, Sisson and Hjerpe for Signal Mountain;
Rohwer and Wiggins for Universal Atlas; and
Davis, Lewis and Parsons for Volunteer.

[2] Com. Ex. 547-3 W-3 Z.

[3] Com. Ex. 547-4 C: The letter went to Dalby of Cumberland, Dannelly of National, McGovern of Hermitage, Houser of Lehigh at Birmingham, Ala., Johnston of Lone Star at Birmingham, Ala., Baker of Penn-Dixie at Chattanooga, Tenn., Elcock of Southern States, Conkling of Signal Mountain, Wiggins of Universal Atlas at Birmingham, Ala., Parsons of Volunteer, Wilkerson of Penn-Dixie at Atlanta, Ga., and Postelle of Alpha at Birmingham, Ala. The enclosures appear in the record as Com. Ex. 547-4 D-4 J.

[4] McGovern, Sales Manager, Hermitage (R) Tr. 36257-58.
Elcock, Vice President, Southern States (R) Tr. 37545.
Dannelly, Vice President, National (R) Tr. 39568.
Bowen, Vice President, Lehigh (R) Tr. 27006.
Postelle, Sales Manager, Alpha (R) Tr. 25401.
Lewis, Manager, Volunteer (R) Tr. 31689-90.

mained in the Farragut Hotel after the meeting adjourned and several of these did testify as to a discussion of the subject then.

McGovern, Sales Manager of Hermitage, testified that he had first seen "Method of Marketing Cement" in May, 1935, at Nashville where a salesman of Penn-Dixie had showed it to him. He later obtained a copy from Baker, the Sales Manager of Penn-Dixie's office at Chattanooga, and in reply to the question as to why he asked for a copy, he said:

> "A. Well, it struck me as being a pretty clear statement of the policy that we had in effect, and we had one or two salesmen that had only been with us for a short time, and I thought it would be good to send to them.
>
> • • •
>
> Q. Prior to receiving that letter, can you tell me whether or not you had done anything in connection with this document that Mr. Baker had given to you? A. Yes, sir; I had a stenographer to copy it, and mailed it to our salesmen.
>
> Q. Can you say approximately how long prior to the receipt of this letter from Mr. Monday in July that you had done that? A. It was along about the first part of June of that year."[5]

Upon examining the minutes of the Knoxville meeting of July 17th, McGovern felt certain that it represented the proceedings had at the meeting, and he testified that he did not see anything entitled "Method of Marketing Cement" at the meeting, and there was no discussion of selling direct or through a dealer at the meeting.[6]

After the meeting, witness recalled a discussion concerning sales of cement for a grading and drainage job which had a "chert" surface and had been sold direct.

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[5] (R) Tr. 36255.

[6] (R) Tr. 36257-58.

This developed a difference of opinion. McGovern testified:[7]

> "Q. Will you tell us when the discussion occurred and how it occurred? A. Well, after the Institute meeting adjourned someone brought up the discussion about one of the companies there,—I have forgotten which one,—regarding sale of grading and drainage job that had a chert surface, direct, and there was quite a good bit of discussion regarding it as there were quite a few there under the impression, or under the opinion, rather, that that type of construction should be sold direct. There were others there that did not want to sell that direct, wanted to sell that type through the building supply dealer, and after wrangling back and forth, why, someone sat down and wrote in longhand, similar to that interpretation.
>
> Q. You mean similar to Commission's Exhibit 547-J, which I showed you a moment ago? A. Yes, sir; similar to that; and after he had written it he read it and said, 'This is going to be my policy,' and, as I remember, one or two more at that meeting said, 'We are going to sell that type direct.' "

The witness was certain that quite a few had left before this discussion arose and that "Some expressed approval and the others either expressed disapproval or said nothing."[8] McGovern could recall, of those present, only Monday, Dalby, Conkling, Parsons, Dannelly and Bowen.[9]

Elcock, Vice President of Southern States, testified that he remembered no discussion of marketing methods and sales direct or through a dealer at this Knoxville meeting. He did, however, remain there over-night, getting into a poker game, and after the District meeting he recalled a discussion as to the sale of a bridge job between McGovern and Baker in which McGovern said "Is that your policy?"

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[7] (R) Tr. 36259.

[8] (R) Tr. 36260.

[9] (R) Tr. 36413.

and Baker replied "Yes, it is my policy." That was all the witness could remember.[10] The witness then testified:[11]

> "Q. Did you on that occasion or at any time ever enter into any agreement or understanding or arrangement with any other Respondent that you would follow or adhere to any such document as the one I now show you, which is Commission's Exhibit 547-4 D to 4 J? A. I never enter into any agreements with any competitors, Mr. Werle. I operate my own business.
>
> Q. And that covers this document, does it? A. That covers that document."

Dannelly, Vice President of National, testified that the first time he saw "Method of Marketing Cement" was in the hands of a competitor whom he met in the street in Birmingham in May or June, 1935. It was a representative of Atlas, and he thought it was one Wiggins, and at Dannelly's request, he subsequently sent him a copy.[12] He saw no copy of this at the Knoxville District meeting, but after the meeting he recalled a discussion concerning a grading and drainage job at which Parsons, McGovern, Conkling and himself were present and others were "in and out" while the meeting was going on.[13] A subject which was "more argued than discussed" was "interpretation that might be placed on methods of sale,"[14] As to the outcome of the discussion, Dannelly testified:

> "A. Well, the argument waxed kind of warm, and after some length of time, why, somebody came up with a statement, 'Well, here is what I am going to do, and you boys can take it or leave it whether you like it or not,' and he expressed his opinion very much in line with what that document there says.

[10] (R) Tr. 37545.

[11] (R) Tr. 37546.

[12] (R) Tr. 39565-66.

[13] (R) Tr. 39568.

Q. Well, when you referred to 'that document'—
A. I mean this particular exhibit, 547-4 J.

* * *

Trial Examiner Norwood: They were accusing you of violating the Code, were they?

The Witness: Well, the Code was not in effect at that time, Judge, but it was somewhat similar to that.

Trial Examiner Norwood: Accusing you of fudging, though, weren't they?

By Mr. Werle:

Q. Let me ask you whether you made any change in the practices of your company after this occasion when you had this discussion at Knoxville? A. We did make a change in reference to the particular interpretation of a grading and drainage job as being interpreted as being a paving job, therefore, then, we watched to see what the man was going to do who made the statement there at the meeting, and when we saw that he was quoting that type of work direct, why, we also quoted it direct.

Q. Prior to this occasion, Mr. Dannelly, do you recall whether anybody had been selling that kind of work direct prior to that time? A. No, we had not; it had not been the practice of any company to do so, but on this particular job, why, after the job was let we ran into the fact that a certain company had quoted that particular job direct, and we met the competition and shared in the sale of it.

Q. This was prior to this occasion? A. Oh, yes; it was prior to that argument.''[15]

Bowen, Vice President of Lehigh, testified that the ''Method of Marketing Cement'' was not referred to at the Knoxville meeting but that while in Knoxville on that occasion a copy of the paper was brought to his attention[16]

[14] (R) Tr. 39568.

[15] (R) Tr. 39569-71.

[16] (R) Tr. 27006.

by a representative of Signal Mountain. Asked if he expressed any concurrence of approval of the paper, Bowen replied:[17]

> "A. No. I recognized it as being a restatement of the policy which the Lehigh Company had adopted in April of 1935, and, of course, I was heartily in favor of that policy. I recall seeing nothing in this paper that was not at all inconsistent with that policy."

And subsequently returning to this subject Bowen said:

> "Q. What was the purpose of having the announced policy of the Lehigh Company restated in any such form as this? A. That is what I could not understand. I thought that I had written the Lehigh Company's policy concisely, as clearly, and as definitely as I could. I was not particularly interested in anybody else's restatement of it; certainly it involved no change in my policy.
>
> Q. Wasn't the restatement in that form in order that your sales department might have more convenient and quicker understanding of the policy? A. In so far as I was concerned, when we put the policy into effect I had called together our district sales managers in the eastern and southern territory, explained to them exactly what our policy was going to be, and how it would operate, discussed each and every item of it with them, told them exactly how the policy would operate and what we expected each man to do.
>
> Q. Did you receive a copy of that method of marketing which is in evidence as Commission's Exhibit 2266,—did you receive copies of it from any source? A. Yes, I think before the time of this Knoxville meeting, I think I had received a copy of this paper, or one about like it.
>
> Q. From whom? A. Mr. Rader at Chicago.
>
> Q. Did you ever have more than one copy of it in your possession? A. From the one copy that I had in my possession, after having it for some time,

[17] (R) Tr. 27007.

I finally made enough copies to send one each to our district managers in charge of our various offices, simply with the idea that maybe it might be convenient for them.

Q. Whose restatement was this, of the Lehigh policy, that is embodied in this Exhibit 2266? A. You mean who prepared it?

Q. You said it is a restatement. I am asking you whose restatement it is. A. I do not know.

Q. You don't know the authorship? A. No.

Q. The source? A. No."[18]

Postelle, Southern Sales Manager of Alpha, stated that he attended the Knoxville District meeting with Mr. Coogan and that they left right after luncheon, around 1:00 or 1:30 o'clock, and that there positively was no discussion of the method of marketing cement while he was present in the meeting.[19] He never saw a copy of "Method of Marketing Cement" before it was shown to him on the witness stand.[20]

Lewis, Manager of Volunteer, testified that he attended the Knoxville meeting. Upon examining "Method of Marketing Cement" (Com. Ex. 547-4 D to 4 J) and being asked whether it was discussed at the meeting, the witness answered:

"A. That seems to be some discussion of marketing, some detail. I have no recollection of any discussion of that while I was at the meeting.

• • •

Q. Was there any discussion of any method of marketing, or anything of this character at the meeting while you were there? A. There may have been some general discussion, but I do not have any recollection of it.

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[18] (R) Tr. 27241-42.

[19] (R) Tr. 25401.

[20] (R) Tr. 25402.

Q. And did you ever see this paper before, or anything like that? A. No, sir."[21]

Many respondents never saw "Method of Marketing Cement" before this case.[22] Some companies said they had seen something like it.[23] Some companies testified they used it.[24]

11. How to Sell in Colorado

In August, 1935, Brooke, Sales Manager of Monarch, wrote to Warner, Sales Manager of Colorado, enclosing copy of sales policies in Texas and saying "If you have a similar policy for the States of Colorado and New Mexico, we will appreciate a copy of it so that we may conform to the customs in these States."[1] Warner replied that Colorado had not promulgated a policy for the States of Colorado and Wyoming but that they sold everything through dealers except sales to railroads and to the United States Government, Department of Interior.[2] Brooke testified that he sought this information from a competitor

[21] (R) Tr. 31689-90.

[22] Davis, President, Superior (R) Tr. 29650-53.
Bates, J. E., Sales Manager, Federal (R) Tr. 30817-19.
Coogan, Vice President, Alpha (R) Tr. 24431-32.
Postelle, Sales Manager, Alpha (R) Tr. 25402.
Fellows, Sales Manager, Alpha (R) Tr. 25945-47.
Hartley, Sales Manager, South Dakota (C) Tr. 12741-42.
Affleck, President, Universal Atlas (C) Tr. 13062.

[23] Rader, Vice President, Lehigh (C) Tr. 12981-83.
Cabanis, Sales Manager, Northwestern States (C) Tr. 12627-28.
Capen, Vice President, Dewey (C) Tr. 12681.

[24] Rader, Vice President, Lehigh (C) Tr. 12983.
McGovern, Sales Manager, Hermitage (R) Tr. 36254-55.

[1] Com. Ex. 947-10 B.

[2] Com. Ex. 947-10 A.

because it was for a territory which Monarch did not usually sell and where they had no salesmen, and he was not sure of the method in which highway work was generally sold. He wanted to quote one Cooke, a contractor and director in Monarch, a price that would "at least not put him to a disadvantage, and I did not want to quote it in such a way that would bring any antagonism from our dealer customers."[3] As it turned out Cooke's superintendent was able to get a better price on cement in Colorado than Monarch quoted him.[4]

12. Denials of Agreement and Some Company Statements

Officers of most of the companies testified that there never was an agreement to classify customers[1] and that the

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[3] Brooke, Sales Manager, Monarch (R) Tr. 42324-25.

[4] Id., Tr. 42326.

[1] Coogan, Vice President, Alpha (R) Tr. 24734.
Capen, Vice President, Dewey (C) Tr. 12685.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39857.
Moore, R. W., Vice President, Dewey (R) Tr. 47085, 47090-91, 47100-01.
Bates, J. E., Sales Manager, Federal (R) Tr. 30701-02.
Georgia (R) Tr. 37606-07 (adoption).
Giant (R) Tr. 37606-07 (adoption).
Wood, General Manager, Green Bag W. Va. (R) Tr. 29535.
Brobston, President, Hercules (R) Tr. 26068.
McGovern, Sales Manager, Hermitage (R) Tr. 36335.
Scott, H. M., President, Keystone (R) Tr. 27493.
Horner, President, Kosmos (R) Tr. 36820.
Hogan, President, Lone Star (R) Tr. 34560, 34573.
Colburn, Vice President, Marquette (R) Tr. 39036.
Dawson, Vice President, Medusa (R) Tr. 40066-67.
Alexander, President, Missouri (R) Tr. 37270, 37272.
Hoenig, Sales Manager, Nebraska (R) Tr. 42072-73, 42076-77.
Robeson, Vice President, Nazareth (R) Tr. 28235, 28245.
MacDonald, Vice President, Northwestern States (R) Tr. 36520.
Russell, Vice President, Peerless (R) Tr. 34392.

Institute did not control or dictate customer classification.[2]

Reiter, testifying as to difference in policy in regard to classification in Texas and Florida from the rest of the country at the time that he was Chairman of the Cement Code Authority, was asked whether the policy was not announced to his organization and "passed on by him to the other mills?" Reiter replied:

> "A. Not at all. It was announced to their customers and at the time of which I speak that we had our first meeting with Captain Collins, I had an inquiry as to the state of the individual policies and, for that reason, I could not give information to Captain Collins at our first meeting."[3]

Lucas, Vice President, Petoskey (R) Tr. 38718.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37708, 37941-42.
Hartley, Sales Manager, South Dakota (C) Tr. 12770-71.
Southern States (R) Tr. 37607.
Warren, G. E., Vice President, Southwestern (R) Tr. 29095, 29103, 29382-83.
Blair, W. R., Sales Manager, Southwestern (R) Tr. 38903-04, 38956-58, 38981, 39416-18.
Standard (R) Tr. 37606-07 (adoption).
Davis, President, Superior (R) Tr. 29601.
Utah (R) Tr. 37606-07 (adoption).
Hanahan, President, Volunteer (R) Tr. 38648-49.
Vulcanite (R) Tr. 37606-07 (adoption).
Elliott, Vice President, Whitehall (R) Tr. 28576-77.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35917.

[2] Moore, R. W., Vice President, Dewey (R) Tr. 46900.
Manley, General Manager, Hawkeye (R) Tr. 41630-31.
McGovern, Sales Manager, Hermitage (R) Tr. 36333-34.
Georgia (R) Tr. 26136-37 (adoption).
Giant (R) Tr. 26136-37 (adoption).
Colburn, Vice President, Marquette (R) Tr. 39038.
Alexander, President, Missouri (R) Tr. 37217, 37220-21.
Standard (R) Tr. 26136-37 (adoption).
Utah (R) Tr. 26136-37 (adoption).
Vulcanite (R) Tr. 26136-37 (adoption).
Nelson, J. L., *supra*, Tr. 36026.

[3] (C) Tr. 3489, see also *infra*, pp. 2388-90.

Captain Collins was the Procurement Officer for the purchase of cement by the Works Progress Administration.

Coogan, Vice President of Alpha, declaring the outcome of its sales policy as to classification to be the product of thirty years of experience, and the influence of the NIRA in crystallizing opinion on the subject, said:

> "A. It is based on our past business experience in the past 30 years. It is a gradual development into a method which is now used by our company.
>
> Q. I intended to ask you, Mr. Coogan, whether or not the NIRA, in the negotiations for the Cement Code, had any bearing on the development of your marketing policies concerning the division of work? A. Well, it did have some effect. And I think it tended to, perhaps, to a little more direct selling especially after Article XI was suspended from the Code.
>
> • • •
>
> A. Of course under the NRA Code, as I have stated before, that allowed us to talk to our competitors and to our customers, and that enabled us to crystallize our opinions and to perhaps work out a method which would fit in better to the picture inasmuch as the business was rapidly developing and changing, it was necessary for us to change, and that was a tendency toward more direct selling, which was, of course, strongly objected to by the dealers and they had influence enough to have Article XI suspended."[4]

As to the inevitable tendency of the policies of competing companies to conform in order that they may compete in the same market, Coogan said:

> "A. Yes, our policy since 1930 has been that if we sell direct we sell at the same price whether we sell to our dealers, if I understand your question.
>
> Q. Then, if you sold on a job of that kind, Mr. Coogan, to a dealer who would re-sell on that same

[4] (R) Tr. 23614-15.

job, the dealer would not quote as low a price as the competitive manufacturer selling direct would quote to the purchaser on that same job? A. No. I do not see how he could unless we were willing to make a lower price to that dealer at that destination on that particular job in question.

Q. Then, if a competitor is selling direct and you are selling the same work through a dealer, would the retailer have any chance of making a sale? A. As a general statement, he would have no chance of making such a sale.

Q. Well, then, in your experience, what has been the practical result? What is the practical effect, Mr. Coogan, when one company sells direct. Do all the companies then necessarily sell direct; or what has been your experience? A. Eventually that is bound to happen, all companies will sell direct on the same class of work.

Q. Which would eventually then lead us to what? Will you explain that, Mr. Coogan? What has been your experience? A. My experience has been that when any one important competitor or any number of competitors quote jobs direct, that we must follow to meet that competition. If we do not, we have to forego the business.'[5]

Koch, Vice President of Lone Star, discussing Lone Star's classification of business, said:

"The Lone Star Cement Corporation had classified business so as to indicate what business would be sold direct and what sold through dealers long prior to the Code period. In 1928, when the pamphlet 'Trade Ethics and Marketing Policies' was published by the International Cement Corporation and its subsidiaries, it was stated in that pamphlet that Lone Star cement would be marketed in each community only to or through the recognized and established building material dealers regularly serving such community, with certain exceptions specifically set forth in the pamphlet. The pamphlet itself

[5] (R) Tr. 23638-39.

was withdrawn in June, 1930, but for the most part, the policy with respect to sales through dealers and direct sales announced in the pamphlet, remained unchanged, with some minor variations. For example, the classification of direct sales in Texas did not conform with the policy of the other subsidiaries in other sections. Particularly, sales were made through dealers to concrete product manufacturers in Texas at a time when sales were made direct in other parts of the country.

The Lone Star Cement Corporation has always preferred to sell through dealers wherever possible, and has sold direct to other purchasers only where forced to do so because of similar sales by competitors. Article XI of the NRA Code made no substantial change in the marketing policy of Lone Star Cement Corporation, with the exception of the State of Texas, and there only slightly. After Article XI was suspended, Lone Star Cement Corporation continued to sell on substantially the same basis as before.

In February, 1935, a new statement of policy on this subject was issued which was revised later in April, 1935. This statement of policy did not apply to the State of Texas. An announcement of policy for the State of Texas was issued in July 1935. There was also a later announcement of policy with respect to the State of Florida, the announcement for Florida being dated December, 1937. None of these announcements was the result of any meeting with dealers or dealer organizations, or the result of any meeting with competitors on this subject, or the result of any agreement or understanding with competitors on this subject. Since those announcements, and up to the date of the commencement of this proceeding, there have been no changes in the marketing policy of Lone Star Cement Corporation and there has been no understanding or agreement with any competitor whatsoever with respect to the marketing policy of Lone Star Cement Corporation or its application."[6]

[6] (R) Tr. 33145-46.

Calvin, President of Aetna, discussing Aetna's method of selling cement, testified:

> "Q. Do you have any announced classification of business which you broadcasted to the trade? A. I have never announced any policy since I have been with the Aetna Company.
>
> Q. And will you tell us whether or not you are free at any time to make sales either direct or through dealers at your option? A. I am free to sell the cement the way I see fit.
>
> Trial Examiner Norwood: Do you follow a policy that Aetna had previously announced prior to your coming with the company?
>
> The Witness: Well, if Aetna had an announced policy when I went there, I did not know what it was. I am selling that cement to the best of my ability to make a profit out of it."[7]

Thompson, Sales Manager of Oklahoma and Arkansas, companies in the Ideal group, testifying that neither the promulgation of Article XI nor its suspension made much difference in the practice of these companies, and emphasizing the force of competition in establishing uniformity of practice, said:

> "A. It was just about the way we had been selling cement for years.
>
> Q. For how long had you been selling in substantially that way? A. Oh, I would say we had been selling that way almost ever since the beginning, except I recall that in the early days we did not have highway paving like we had later, and when we first came into existence we marketed that through local dealers instead of selling it direct to contractors, as we do now, and I believe by the time the Arkansas plant was in production we were selling contractors direct; so that Arkansas would be just about the same as Oklahoma. I suppose there was that difference, and there might be some other little differences, but it was just about the same.

[7] (R) Fr. 30163-64.

Q. Did either of your companies initiate the policy of selling direct to paving contractors? A. No.

Q. With one of your competitors selling direct to paving contractors, would you be able to sell through dealers on equal terms with such competitors as were doing so? A. No. That is why we changed. We had to compete in that class of business—either that or forego the business."[3]

* * * *

D. Sales for Federal Relief Work.

1. Conflict Over Course of Sales to Federal Government for Non-Federal Work

Prior to 1933 the manufacturers had sold cement direct to the various departments of the United States Government at the dealers' price or less.[1] However, cement for work located within cities, such as cement for post offices, was sold through dealers.[2]

With the advent of emergency relief purchases in 1933-1934, the Government became the purchaser of cement not to be used on Federal work but on work of a local nature, a large part of which was in cities and towns and of the character which had theretofore been sold by dealers.[3]

Reiter testified that relief purchases, coupled with the depression, injected a new element into the market situation.[4] In the opinion of some manufacturers sales within

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[3] (R) Tr. 46538-39.

[1] *Supra*, pp. 2285-96.

[2] Reiter, General Manager of the Institute (C) Tr. 4268-69.

[3] Dawson, Vice President, Medusa (R) Tr. 40066.
Harkness, Florida State Procurement Officer, U. S. Treasury Dept. (C) Tr. 4915.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6478.

[4] (C) Tr. 4269-70.

cities and towns for the classes of work undertaken by the Federal relief agencies required dealer service.[5]

Dealers objected to having cement for these jobs sold direct.[6]

[In the proposed revision of Article XI of the Cement Code sent to members of the industry on June 8, 1934, the provision for sales to the Federal and State Governments provided direct sales except that "Federal Relief Agency work located principally within cities, towns or villages shall be sold through dealers."[7] This revision, however, never went into effect and so the question remained open.]

In 1935 the problem became more acute by the passage of an appropriation for $4,800,000,000 to be spent by the Works Projects Administration.[8] The Procurement Division of the Treasury Department was to handle all the cement purchases for WPA projects.[9] From July 1, 1935 to November 1936 the total purchases of cement by the Federal Government for WPA work approximated 15,000,000 barrels.[10] The Procurement Division organized its purchasing on a local basis with a separate procurement office for each of the 48 states.[11] Admiral Peoples was in

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[5] Runion, Secretary, Nebraska Lbr. Merchants Assn. (C) Tr. 12049-53.
Blair, W. R., Sales Manager, Southwestern (R) Tr. 38958.
Hoenig, Sales Manager, Nebraska (R) Tr. 42078-81, 42172-73.
Hayghe, Chief of Traffic Proc. Div., U. S. Treas. Dept. (C) Tr. 2277-79.

[6] *Supra*, p. 2334 *et seq.*

[7] Com. Ex. 1021 C.

[8] Com. Ex. 415 (373).

[9] Com. Exs. 415 (373), 1022 N-O; (R) Tr. 37403-04.

[10] Hayghe, *supra*, Tr. 1835.

[11] Com. Ex. 1022 B-H.

charge of the Procurement Division and Captain Collins was his assistant in charge of making cement purchases.[12]

The issue was dealt with indirectly by the February and April, 1935 announcements of the companies[13] and directly in correspondence with dealers and in conferences held in Chicago in the spring of 1935.[14] It was also dealt with by the Institute and by associations of building material dealers in conference with Captain Collins. Manufacturers in other industries organized the Construction League with the purpose of developing a program for Government purchases.[15] On May 18, 1935, Coffin, the President of the Institute wrote to Reiter appointing him Chairman of a committee to deal with the problems presented by the Government relief program. His letter follows:

> "The present setup at Washington seems to point to the necessity of the various heavy goods industries, at some time or other, to meet by representation with the Procurement Division of the Government to map out a plan of purchases of the various materials required in the expenditure of the $4,800,000,000 program.
>
> As you no doubt know, there had been appointed a Construction League in which various industries were represented. A proposed program in dealing with government purchases was prepared by a committee, a copy of which I enclose. The time seems to be imminent when the Construction League will no longer be able to represent all industries and each industry will have to set up its own organization for dealing with this problem.

[Italicized part quoted in Fdgs. Par. Eighteen (b)]

> *For the present, as President of The Institute, I am appointing you chairman of what you might*

[12] Com. Ex. 1022 B.

[13] *Supra*, pp. 2307-32.

[14] *Supra*, p. 2334 *et seq.*

[15] Com. Ex. 415 (373).

call an informal committee, for the purpose of keeping in close touch with the various departments in Washington; and with you I am also appointing:

G. E. Warren
F. M. Coogan
E. P. Lucas
J. F. Neylan
L. T. Sunderland
S. W. Storey

The duty that I am assigning to the members of this committee is to keep in close touch with developments in the purchasing end of material for this governmental work, and report back to me. If and when we are asked to actually appoint a committee with power to act, I will have available the information that you have been able to get, and act accordingly."[16]

In acknowledging this letter, Reiter wrote that he had requested Mr. McFadden, a member of the law firm representing the Institute, "to assist us in keeping in touch with this situation."[17]

Reiter, outlining the nature of the problem presented by the emergency relief and describing the invitation coming from the Procurement Division to the Institute to confer on the subject and his first conference with Captain Collins, said:

"A. There were two building material dealers associations. The name of one was the National Retail Lumber Dealers Association, and the name of the other was, I believe, the National Builders Supply Association, both of whom were quite active during the code period. In 1935, immediately prior to the end of the Code, probably in April, 1935, an appropriation was made of $4,800,000,000, for emergency relief, and this amount of money was given to the President to spend at his discretion. The

[16] Com. Ex. 1022 B.

[17] Com. Ex. 1022 A.

dealers' organizations assumed that the Procurement Division of the Treasury Department would buy materials in large quantities and store them at central storage points even though the materials themselves were used in large quantities and were such as would ordinarily be bought through building material dealers, and they got much interested in the possibility at least of this business being taken away from them, and they communicated with others in the building material business, manufacturers, and so forth, of which I was not one nor the Cement Institute was not one, and as a result of that, a meeting was called here in Washington and it resulted in a luncheon meeting with Harry Hopkins who was the Administrator of the PWA and representatives of these various associations. They discussed the matter with him, and he gave them certain information and advised them to see Admiral Peebles, who is Director of Procurement, and they had a meeting with Admiral Peebles, and he turned the matter over to Captain Collins.

At this time I was advised by the president of the Cement Institute that he had appointed me chairman of a committee to furnish such information to the Procurement Division in this matter as I could. Also about this time a man by the name of Hilts who used to be an officer in the NRA went to the Procurement Division as an assistant for Captain Collins in the Division of Cement Purchases, and he got in touch with Mr. McFadden, our counsel, and suggested that the next time I come to Washington, to both come down and get acquainted with Captain Collins, which was done. We met Captain Collins with Mr. Hilts and I think one or two others in the Procurement Division.

At that time Captain Collins told us about some of the information that he wanted for his use in purchasing cement, some of the problems which he foresaw and some of the plans of the Procurement Division for purchasing materials, and these questions were of a nature that I could not answer for the industry, but at the next meeting of the Trade Practice Committee I made a report of this conver-

sation with Captain Collins, and I was then shown copies of individual sales policies of several members there, I was told that by the cut and try method, these sales policies had become uniform at least through the East and the Middle West, and I was instructed to carry on our discussions with Captain Collins. Then he called a meeting to which I was invited and representatives of the two dealers' associations, to discuss this matter."[18]

Concerning his second conference with Captain Collins which took place July 12, 1935, and the importance of government purchases of cement, Reiter testified:

"Q. And the matter, as I understand it, was what classes of trade should be sold direct by the manufacturers and what classes should be sold through the dealers? A. That is one of the things that Captain Collins was interested in, and we had with us, that is the cement people there had with them one member of the industry[19] who had his printed sales policy which he had distributed, and that was exhibited to Captain Collins, and on that basis the matter was discussed among those present.

Q. Prior to going to Captain Collins with the matter, representatives of the manufacturers and representatives of the dealers had rather thoroughly discussed the subject, had they not? A. I had talked to the dealers about it. I don't know who else was there. We had been for months in disagreement with our dealers, or at least the members of my industry were in disagreement with dealers over many matters, and it was a serious matter to the dealers, I believe, and it was certainly a serious matter to members of the Cement Institute because these dealers accounted for the sale of something over 50 per cent of all cement shipped.

Q. Even at that time? A. I think at that time and others.

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[18] (C) Tr. 3484-86.

[19] Neylan, Asst. General Sales Manager, Lone Star.

Q. As a matter of fact, since the depression in 1933, has not the proportion of consumption of cement tended to increase largely, I mean the proportion represented by Government purchases of cement rather than commercial purchases, tended to increase quite largely? A. Well, of course, Mr. Wooden, during the depression and the rehabilitation program, the amount of cement purchased by the Government for Government projects greatly increased. However, if you include the purchases for municipalities, counties, parishes and so forth, the cement used on public works was always a considerable part of the cement sold.

Q. As the proportion of government purchases increased during the depression, that carried the possibility that the proportion or amount handled through the dealers would decrease, did it not? A. Yes, I think that follows.

Q. You mentioned April, 1935, as about the time the mills adopted sales policies describing the methods or classes of trade which would be sold direct and those which were not to be direct. A. No, you misunderstood me on that. That was the approximate time of the start of these negotiations with the Procurement Division by others. I did not go into it for a month or two. I believe that the adoption of these individual sales policies covered quite a period of time before that."[20]

Continuing, Reiter was asked whether, following these conferences with dealers and Captain Collins, purchases for WPA purposes were made through dealers. He testified:

"A. I think they were, for the most part, and in making that answer, Mr. Wooden, I am assuming that the cement companies followed their individual, announced policies.

Q. Did you have brought to your attention cases where manufacturers were quoting, nevertheless, on

[20] (C) Tr. 3486-88. As to the adoption of these policies referred to by Reiter, see *supra*, pp. 2307-32.

WPA purchases—quoting direct? A. I think that was done quite a few times.

Q. Did you handle those as complaints of violations of the code or the voluntary code—— A. (Interposing) I am sure that we did not, because it was not a part of the code, although it was nevertheless a violation of the company's own announced sales policy.

Q. How did you handle such matters? Did you handle them as chairman of the Trade Practice Committee? A. Well, at that time I was chairman of the Trade Practice Committee, but I do not recollect that I handled them.'"[21]

In a letter dated June 28, 1935, by Mr. McFadden of counsel for the Institute to Reiter, McFadden refers to the conference above described by Reiter and described it as "a preliminary conference". McFadden continued:

"It seems apparent to me that the Procurement Division has certain questions in mind regarding the purchase of cement. Some of these are as follows:

1. Can the United States Government always purchase cement at a price which is at least as low as the price at which cement manufacturers would sell cement to contractors?
2. Will the cement manufacturers bid for cement in such a manner as to assure to the Government in all cases the full benefit of any land grant or special freight rates available to the Government?
3. Will cement manufacturers recognize a saving in selling cost when dealing with the United States Government and quote prices which are better than their commercial prices—particularly on large lots?
4. What types of contract are most suitable for the purchase of cement

[21] (C) Tr. 3490-9[illegible]

(a) Firm contracts for specific amount and a definite destination for a specific project,

(b) Quarterly or term contracts for large definite amounts,

(c) Contracts for a definite period at a fixed price for indefinite quantities and unspecified destinations?

It might be that the last type of contract would be considered by the Government for the purpose of massing all of the indeterminate requirements of a given state or section of the country.

I feel that your visit to Washington was very much worth while in giving you an opportunity to have this conference. It established a contact in a fine atmosphere, and will give you an opportunity to prepare yourself to answer questions of this type."[22]

Meanwhile, apparently by authority of the Board of Trustees, the Informal Committee appointed by the President of the Institute was replaced by the members of the Trade Practice Committee. A letter to the members of the Institute, dated July 10, 1935, referring to this matter and to a request by Captain Collins for a joint meeting of the material dealers and cement manufacturers, stated:

"At its meeting in June the Board of Trustees of the Cement Institute authorized the President to appoint a committee to keep the Institute informed regarding procedure and requirements on purchases of cement by the U. S. Government. The President subsequently designated as this committee the members who comprise the Trade Practice Committee, who in turn were those who had served as members of the Code Authority.

[Italicized part quoted in Fdgs. Par. Eighteen (b)]

The Trade Practice Committee met in Chicago on July 9 and designated your Chairman, together with Counsel, to serve as a subcommittee to expedite this

[22] Com. Ex. 1022 B-C.

work. The sub-committee had a preliminary conference in Washington about ten days ago with Captain H. E. Collins, who is assistant to Admiral Peoples, Director of the U. S. Procurement Division.

Also present at this conference was Mr. H. E. Hilts, who is a commodity chief in that division, serving as adviser on cement problems.

The U. S. Procurement Division will have general supervision of the purchase of all materials under the so-called four billion dollar emergency fund. This will include purchases for resettlement programs, for highways, for federal relief activities and for other projects financed by that fund.

We have just received a request from Captain Collins to attend a joint conference to be held Friday afternoon, July 12, at his office in Washington to discuss cement purchases. He requests that both the dealers and the manufacturers of cement should be represented at this conference by a small committee.

We are informed that the dealers will be represented by Messrs. Frank Carnahan of the National Retail Lumber Dealers Association and L. I. MacQueen, Secretary of the National Federation of Builders Supply Association. To represent the cement manufacturers President Coffin has designated Mr. John F. Neylan and Mr. George H. Reiter, who are both members of the Trade Practice Committee.'[23]

Reiter, Chairman of the Trade Practice Committee, wrote to the members of the Committee on July 8, 1935 enclosing copy of McFadden's letter of June 28[24] and drew attention to an executive order describing rules and regulations relating to the prosecution of projects under the Emergency Relief Appropriation Act of 1935. The letter then continued:

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[23] Com. Ex. 1022 N.

[24] Com. Ex. 1022 B-H, *supra*, p. 2392.

"This Executive Order indicates that it is proposed that the Government will furnish construction materials under each such form of contract. Captain Collins of the Procurement Division also apparently has the possibility in mind that this Division may be called upon later to purchase materials for other branches of the Government.

Contact with the Procurement Division was originally had by Messrs. Mehren and Kinney of the Portland Cement Association. Mr. Kinney attended a meeting of building material interests held at Washington, D. C., on May 17. I have just learned that there is a conference arranged between this group and Admiral Peoples of the Procurement Division at 4:00 P. M. Tuesday, July 9, and that Mr. Mehren will attend that meeting and advise us of what was done."[25]

The minutes of the Trade Practice Committee at its meeting the following day record:

"After considerable discussion, motion was made by Mr. Lucas, seconded by Mr. Warren and unanimously carried, that the Committee in their contacts with the Procurement Division present the plan of marketing cement to the U. S. Government as included in the announced policy of a number of individual companies in the East and Middle West and report back to the Committee the objections of the Procurement Division to such policy, with a view of determining what sales policy would be satisfactory to the Procurement Division.

After further discussion, motion was made by Mr. Sunderland, seconded by Mr. Lucas and unanimously carried, that the Chairman and Mr. McFadden continue the work at Washington, the Chairman giving as much time as possible and further that the Chairman feel free at any time to call upon Members of the Industry for help in such work."[26]

[25] Com. Ex. 1022 I.

[26] Com. Ex. 591 B.

On the same day Mehren, President of the Portland Cement Association, attended the meeting between representatives of the material dealers and Admiral Peoples. Describing the purport of this meeting in a note to Reiter, written in pen on the evening of the same day, Mehren wrote:

> "Meeting held with Admiral Peoples, Capt. Collins, Max Dunning today. Attached brief presented, signed by Association whose names are on attached slip. I took the authority of allowing 'Cement Institute' to be signed. Do I get murdered for it?
>
> Much discussion of cement because of call for bids for cement on Cleveland housing project. McQueen made good statement. I contended that cement mfrs. & dealers, after long experience and much argument before NRA had worked out best way of distributing cement & that the Government should accept that conclusion.
>
> Much other argument. Meeting lasted 1½ hours. Result: same as when saw them, i.e., to meet with representatives of industries affected. Decided to take cement first; Peoples insisted on it. Capt. Collins named next Friday at 2 p.m. in his office—both mfrs. & dealers to be represented. Wants small committee. Carnahan, of Lumber Dealers, wants to be present. McQueen will be there and bring one other man. I agreed that you and another representative would come. Of course, I would have preferred to confer with you, but there was no time. Hope you approve.
>
> McQueen will phone you from Phg. tomorrow (Wednesday). I'll be in N. Y. but will be back here Thursday. McQueen will suggest you met him at Washington Hotel on arrival. I'll join you there."[27]

Questioned about Mehren's authority to appear and represent the Institute at this meeting, Reiter testified:

> "Q. Do you say, Mr. Reiter, that Mr. Mehren appeared in this matter, as indicated by 1022-J, purely

[27] Com. Ex. 1022 J-K.

as a volunteer, and without any arrangement or without the knowledge of any one that he was going to appear on behalf of the Institute? A. I can answer that positively that he did."[28]

Meanwhile MacQueen, Secretary of National Federation of Builders Supply Association, circularized his supporters to emphasize the importance of the problem to material dealers with a possibility of disaster to them in a program of direct buying by the Government. He said:

"On Friday, I sent to you an urgent telegram. Already some cement for certain relief projects has been bought direct and while in Washington on July 3rd, I was definitely informed that this policy would be followed out by Admiral Peoples, Chief of the Procurement Division for the Relief Administration. I am leaving for Washington tonight for a meeting with Admiral Peoples on July 9th. This policy which he has inaugurated MUST BE STOPPED if we are to avert disaster to our business.

Those dealers upon whom I called for assistance have already shown a splendid degree of cooperation. I am in receipt this morning of copies of telegrams and confirming letters from all over the United States. We must have more of them. It is recognized in Washington that nothing can be accomplished except by political pressure.

If you do not get a response from your Senators and Congressmen promptly, please place the matter before them *again* as forcibly as possible. If their reply is only vague and perfunctory, please wire back that you wish him to make a personal protest to Admiral Peoples. It is better to offend your Congressmen by being too persistent than to lose your business through excessive politeness or inactivity.

Because your Senators or Congressmen may think that you are only selfishly interested, I am enclosing

[28] (C) Tr. 4310.

a sheet containing a line of argument which may not have occurred to you and which may be new to your representatives in Washington.

In making your appeal, please bear in mind that you are not asking something merely for yourself. This program of direct buying by the Government does not pay. It is not economical. It does not facilitate recovery. It represents short-sightedness in business and lack of understanding of the ultimate ends which all are seeking to achieve.

Each day is important and I most earnestly urge you to keep after your Senators and Congressmen until you are sure that they have definitely presented the facts to the Relief Administration. Ask every other dealer in your market to assist for I do not have sufficient funds to communicate with all. Get assistance from your local Chamber of Commerce if possible. If your local contractors are organized, enlist their assistance.

DIRECT BUYING BY THE GOVERNMENT FOR RELIEF PROJECTS MUST BE STOPPED.

To accomplish this, you must do your part, at once.''[29]

On July 10 Mehren wired Reiter:

[Italicized part quoted in Fdgs. Par. Eighteen (b)]

''BELIEVE IT DESIRABLE TO BRING TO WASHINGTON COPIES ORIGINAL CODE AND OF DRAFT OF DIRECT AND DEALER SELLING AGREED ON SUBSEQUENTLY WITH DEALERS ALSO COPIES DECLARED POLICY OF COMPANIES REGARDING DIRECT AND DEALER SELLING''[30]

Before attending the meeting with the Procurement Division and the dealers, scheduled for July 12, Reiter met with MacQueen and Carnahan, representative of the dealers. Concerning this meeting, the reason for it, and again stating the nature of the problem of government purchases for relief work, Reiter testified:

[29] Com. Ex. 2404 A-B.

[30] Com. Ex. 415 (542).

"A. So far as I remember, these dealers' representatives, having been present at two previous meetings that none of us had attended, I was interested in finding out what happened at these other meetings, or what the meetings had meant so far as they were concerned.

At this meeting they also explained to us their stand, believing that this cement sold for emergency relief projects should be sold through the dealers, and stated, as they did later before Captain Collins, that if this class of construction work which had previously been in their field was taken away from them that it was a very serious matter to their industry. That was the subtance of the conversation we had before the meeting with Captain Collins.

Q. When you say 'within their fields' you mean territorially or geographically as to being within the confines or portions of the cities and towns? A. Not exactly, Mr. Wooden. I mean that this Federal relief money was being spent for the construction of work which in the past had been normally sold by dealers.

Q. And had normally been constructed by private parties? A. Yes, sir.

Q. I believe you agreed yesterday that the injection of the Federal relief emergency appropriations, and the purchase of cement direct by the government, injected a new element into the situation. A. That is right.

Q. The new element was that the dealers, by reason of the depression, were not selling the normal amount or the usual amount of cement and the government stepped in to encourage construction with the expectation, as in the past, of buying direct? A. I cannot follow that.

Q. All right, state it yourself. A. The government, through this large appropriation—this $4,-800,000,000 which was to be spent at the President's direction—was trying to encourage all business, and apparently through the usual avenues of trade, and this money was going to be spent, as you mentioned previously, on work that had, in the past been done with private or local money and the dealers rather expected that the government would lump all of

these purchases together and purchase at central warehouse contrary to the way the cement had been purchased for such projects before.

Q. But if the division of trade which was set forth in the NRA Code had been followed strictly, the government would have bought this direct from the mills rather than from the dealers. A. Yes, in that all purchases directly by the government would have been sold direct by the cement manufacturers to the government.'"[31]

Reporting to the Institute membership on July 15, 1935, upon this meeting of July 12, Reiter recorded the presence at the meeting of Captain H. E. Collins, Max Dunning, and H. E. Hilts, representing the Procurement Division; Neylan of Lone Star, McFadden of counsel, and himself for the Institute; MacQueen, Stoner and Chaffee, representatives of the National Federation of Builders Supply Association; Carnahan for the National Retail Lumber Dealers Association; and Pugh for the Committee of Building Materials Industry, and continued:

"The several persons present had previously conferred separately with representatives of the United States Procurement Division, and had been asked to return for a joint conference at which they were to indicate more definitely the program sponsored by their respective groups.

[Italicized part quoted in Fdgs. Par. Eighteen (b)]

The Committee for the Cement Industry explained to Captain Collins that there had developed in the Cement Industry a method of sales and of distribution which was characteristic of the territory east of the Rocky Mountains—that is, excepting in districts 10, 11 and 12, there was a definitely accepted practice of marketing cement throughout the country. It was therefore stated that the committee believed it would be in accord with such established practices for the United States Government to purchase direct from cement manufacturers in the following cases:

[31] (C) Tr. 4318-20.

1. *Purchases by or for governmental departments not regularly engagd in emergency relief work.*

2. *Highway pavements and grade crossing elimination projects.*

3. *Bridge, culvert and repair work awarded as part of highway pavement contracts.*

4. *Water supply development work located outside of and not designed to serve cities, towns and villages local to such projects.*

5. *Large water power, flood control and irrigation work located entirely or partly outside of cities, towns or villages."*

As to all other purchases and projects, it was indicated that it would be in accord with the established practices of cement manufacturers in Districts 1 to 9 inclusive if the United States Government refrained from purchasing direct. In any such case where the government awards a contract to a contractor such contractor should be permitted to furnish cement which he would secure in accordance with the marketing practices of the cement manufacturers.

[Italicized part quoted in Fdgs. Par. Eighteen (b)]

Mr. MacQueen, speaking for the dealers, stated that he was in accord with the statement that this plan recognized and preserved the normal method of doing business in the Cement Industry.

Mr. MacQueen, outlined the economic difficulties of the dealers, stating that they were operating at about 12½% normal. He stated that it was in the interest of all that the normal channels of distribution should be preserved, in order to avoid further unemployment and higher cost of materials, and in order to guarantee that these normal channels of distribution would continue to be available after the exhaustion of the Federal Emergency Relief funds. He stated that in his opinion if the United States Government should purchase all of its materials direct the dealers would lose such a substantial part of their

present business that some fifty thousand of their employees would be thrown out of work and put on the relief rolls.

Mr. MacQueen stated that in his opinion it was an illusion for the Government to believe that it could save money by assuming the dealer function itself, since that function represented a cost which the Government would have to bear in any case.

Captain Collins said that the only comment he was free to make was that he was sincerely impressed by everything that had been said. He indicated that the conferees would hear from him at an early date, so there is a prospect of further conferences on this subject."[32]

Reiter testified that the basis for discussion at this meeting was the sales policy of the Lone Star Company submitted by Neylan, a member of the Committee.[33] His policy was represented as conforming with established practices throughout the industry east of the Rocky Mountains.[34] Reiter's testimony continued:

"Q. I take it that those established practices, so far as Federal relief emergency purchases were concerned, went back to this time in the summer of 1934 when the proposed amendment of Article 11 was presented to NRA? A. So far as I know they went back to the time with each company where it distributed its own sales policy.

Q. And were those distributed along in the early spring or late winter of 1935? A. This is the first time I met them, and therefore I can't answer that question."[35]

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[32] Com. Ex. 202 E-G.

[33] (C) Tr. 4321-22.

[34] (C) Tr. 4322.

[35] (C) Tr. 4323.

2. Procurement Division Accepts Manufacturers' Policy in Principle

The manufacturers met with confusion in the application of their policy in respect of cement to be used in relief work because government bids for purchase did not always disclose the nature of the work for which the cement was intended, and Reiter conferred about it with Capt. Collins.[1] On this point Reiter testified:

> "Q. Did you take that up with Captain Collins in an effort to get him to issue instructions to his State Procurement Officers, describing the projects in each case in the case of each invitation? A. Yes; inasmuch as he had indicated to us how the Procurement Division proposed to purchase cement for these projects.
>
> Q. Did he issue a bulletin instructing his State Procurement Officers to identify the project and to identify the project by a description and location? A. Yes, sir.
>
> • • •
>
> Q. Was there any confusion over lack of information as to where the cement was to be used?
>
> • • •
>
> The Witness: I think that the invitations were not always specific in that matter, Mr. Wooden.
>
> *By Mr. Wooden:*
>
> Q. Did you ask Captain Collins that they be made specific in that respect? A. Yes.
>
> Q. Were they made specific in that respect? A. Generally speaking, they were, although there were many exceptions, which came to my notice.
>
> Q. Why were you interested in having them made specific in that respect; namely, as to the destination where the cement was to be used? A. Well, again, what I have in mind is that under these individual sales policies as announced by cement companies, it

[1] Reiter, General Manager of the Institute (C) Tr. 4325.

would make a difference whether cement was to be sold direct or through a dealer depending on the location of the job.

Q. Was not the matter of quoting a destination price involved to some extent? A. It was in some cases. I have in mind an invitation of the Procurement Officer of the State of California, who issued an invitation for an indefinite quantity of cement, but indicated it was large in amount, and asked for delivered prices, but did not say where the cement was to be delivered.

Q. In the event that—you say he asked for delivered prices without saying where it was to be delivered? A. That is right. (Laughter.)"[2]

Reiter stated that a purpose to prevent one dealer from trading in the sales territory of another was not a reason, so far as he was concerned, and he felt sure it applied to other members of the Committee, in asking Captain Collins to designate the destination of cement purchased by the Procurement Division.[3]

Concerning the basis of his protests to Captain Collins regarding Procurement Officers' invitations to bid and Captain Collins' attitude toward the manufacturers marketing policies, Reiter testified:

"Q. Was one of the matters that you took up with Captain Collins about that time—in, say, August, 1935—the fact that some State Procurement Officers had specified f.o.b. mill quotations? A. I am pretty sure that that matter was discussed with Captain Collins.

Q. And the issuance of instructions by him to give destination: Was that satisfactory to you as a solution of the matter?

* * *

The Witness: Mr. Wooden, Captain Collins had indicated that certain classes of their pur-

[2] (C) Tr. 4324-27.

[3] (C) Tr. 4327-28.

chases would be solicited from the dealers and I think the burden of my discussion with him was that the practice in the industry was to sell dealers f.o.b. their destination and I called to his attention that where that was true, title to the cement passed to the dealer at his destination and that was the only place at which he, in turn, could transfer title.

By Mr. Wooden:

Q. If the sales had been made direct from the mills, the title would have passed at the mills? A. Under Government destination cost.

Q. And in order to take advantage of Government bill of lading? A. Yes, sir.

Q. Do I understand that Captain Collins indicated that he would not ask or have his Procurement Officers ask for bids from the mills on this WPA work? A. No, I think that is not a correct statement. He indicated, however, that in view of the purpose of the expenditure of this $4,800,000,000 fund that the sales policy, which he saw, of a cement company, was not unsatisfactory to him as a method of purchasing cement in his department.

Q. The difference in cost per barrel by buying from the dealers as against buying from the manufacturers was 15 cents, wasn't it? A. I can't answer that. I presume, or may I say that this Modal mark-up which did fix the retail price of cement by the dealers under their code at 15 cents a barrel in carloads had long since passed out of the picture, so——

Q. (Interposing) Was not the 15 cents differential or mark-up still in effect during the summer of 1935? A. I understand that the so-called Modal mark-up went out with the dealers' code.

Q. You mean as a part of the code, or that it disappeared as a practice that no more 15-cent differentials existed? A. It is my impression that during the days of the dealers' code it was mandatory, and after the end of the code period a dealer was again free to charge whatever differential appeared proper to him.

Q. Don't you know that the dealers' associations continued to favor that 15-cent mark-up? A. Oh, yes, sir, I have heard that.

Q. Was not one result of the buying from dealers on this WPA work that the Government could not take advantage of land grant rates which it might have had in buying direct from the mills? A. Yes; in that part of the country where land grant rates existed, of course."[4]

Neylan, writing to Reiter on August 15th, and referring to their previous meeting with Captain Collins, wrote:

"* * * there is one feature which stands out very clearly and that is the direct statement made by Captain Collins in answer to an inquiry made by Mr. McQueen to the effect that the Procurement Division could not and would not undertake to send bids only to dealers; further that if lower prices were obtained from manufacturers or if lower prices were obtained from brokers or dealers located at a considerable distance from the project the Government would, in all probability, be forced to accept the lower bid unless there was some evidence which indicated that the final delivery cost to the Government might be higher, even though the first price quoted might seem low."[5]

On August 14, 1935 Reiter wrote to Institute members that due to the failure of Procurement Division invitations to bid to specify the purpose for which the cement was to be used "Members of our Industry are at a loss to know whether bids should be made direct or through a dealer under their own policies" and that he had therefore arranged a further conference with Captain Collins at which MacQueen and Carnahan would be present to represent dealers and he and Neylan for the manufacturers.[6]

[4] (C) Tr. 4330-32.

[5] Com. Ex. 1022 P-Q.

[6] Com. Ex. 202 H.

Reporting on this to members on August 17th Reiter wrote:

> "Your committee explained to Captain Collins that it has been a general policy in the Cement Industry to bid directly on Government purchases only as indicated in the five items listed in our General Letter dated July 15, 1935, and that the failure of the invitations to specify the purpose for which the cement was to be used did not permit such companies to make intelligent bids. In view of this explanation and in recognition of the confusion which exists, Captain Collins stated that he would issue a bulletin yesterday to all State Procurement Officers, directing that, effective immediately, invitations to be issued by such officers indicate thereon the purpose for which the cement would be used and the specific location of the project. It is therefore assumed by your committee that hereinafter all invitations to bid issued by the Procurement Division of the United States Treasury Department will specifically describe the purpose for which the cement is to be used if it is to be used for any of the five purposes set forth in our General Letter."[7]

On August 16th Collins wrote to the State Procurement Officers:

> "In preparing proposals for the purchase of cement for a specific project or projects, it is directed that in addition to the information regularly included in such proposals, the name of the project and its location is also shown."[8]

Commenting upon this direction of Collins, in a letter to Wing, then General Sales Manager of Penn-Dixie, Reiter wrote:

> "It appears, however, that Captain Collins has not informed his State Procurement Officers as to the classes of work upon which they may expect direct bids from cement manufacturers. I am not

[7] Com. Ex. 202 I.

[8] Com. Ex. 1022 U, Y.

sure that it is reasonable for him to do so except as a matter of courtesy to ourselves and the dealers in order to avoid unpleasant reactions by State Procurement Officers as indicated in your letter.'"[9]

Reiter testified that he never asked Collins to inform the State Procurement Officers as to the classes of work on which they might expect direct bids.[10] As to the outcome of his conferences with Collins, Reiter testified:

"A. I am trying, Mr. Wooden, to make my answers very exact so far as Captain Collins is concerned, because I have every desire to refrain from misquoting him, even by accident.

I would say that no agreement was reached with Captain Collins. He did indicate to us that he would issue the bulletin such as is quoted in 1022 Y."[11]

Throughout the period of cement purchases for relief work the manufacturers had difficulty in procuring adequate information from invitations to bid in order to enable them to conform to their own policies of classification.

The minutes of the Trade Practice Committee held on September 25-26, 1935 recite:

"The Chairman called the Committee's attention to the fact that two or three Members of the Industry had indicated their desire for the Committee to request Captain H. E. Collins, Assistant Director of Procurement of the U. S. Treasury Department, to further instruct his State Procurement Officers indicating that they may not expect bids from cement manufacturers or dealers f.o.b. cement plants, and also request that he indicate to the State Procurement Officers the classes of work upon which they may expect direct bids from the manufacturers. It was the sense of the meeting that these matters

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[9] Com. Ex. 1022 U.

[10] (C) Tr. 4333.

[11] (C) Tr. 4335.

must necessarily be handled by individual members with the State Procurement Officers and that it was unreasonable to request Captain Collins to handle these matters as indicated for the Industry and the dealers."[12]

3. Experience in Various Procurement Divisions

a. California Procurement Division

On August 26, 1935, Southwestern wired Reiter stating that the Procurement Division in California had issued invitations for bids on an indefinite amount of cement until the end of the year to be delivered to a number of WPA districts in California and these districts had no relation whatever to the location of cement mills.[1] On August 30 Reiter wrote Collins and after referring to this invitation, the letter continued:

> "You will observe that the invitation as written does not cover any specific quantity of cement and, therefore, in effect solicits an option to purchase without obligation to buy.
>
> This invitation in addition requests bids delivered 'to any point' in the 12 WPA Districts of California. You understand that freight is ordinarily a considerable part of the delivered price of cement and, therefore, we do not see how Members of this Industry may make either an intelligent or fair bid under this invitation. On the attached map notice, for example, the extent of District #4. A delivered price at Bakersfield would necessarily be quite different than a quotation for delivery in Mono County in the high mountain area.
>
> We have been much impressed with your handling of matters in your Procurement Division with which we have come in contact. Our discussions have in-

[12] Com. Ex. 591 K-L.

[1] Com. Ex. 1022 Z.

dicated that you realize the equity of a definite and specific contract and it is for that reason that your attention is directed to this invitation.'"[2]

Collins replied, acknowledging Reiter's letter and stated that the State Procurement Officer of California "has been called upon for a complete report in connection with this matter and immediately upon receipt of any information from him I will be pleased to communicate with you further."[3] Reiter testified that he was never advised as to the outcome and heard no more about it.[4]

Again on November 26, Southwestern wired Reiter stating that the California Procurement Division had issued a request for bids on an indefinite quantity f.o.b. mill to run until March 1st next. No project was specified.

" . . . BIDDING ON THIS REQUEST WOULD HAVE EFFECT OF SHUTTING OUT ALL BUT SUCCESSFUL BIDDING MANUFACTURER FROM ALL WPA PURCHASES UNTIL NEXT MARCH AS WELL AS SHUT OUT ALL PURCHASES THROUGH DEALERS . . ."[5]

Reiter wired Collins asking him to investigate and urged that specific quantity be stated and projects be named in the offer to bid and added:

" . . . IF DEALER BUSINESS IT IS PROBABLE NO BIDS WILL BE RECEIVED FOB MILL AS DEALERS ARE ORDINARILY SOLD FOB DESTINATION ONLY."[6]

Writing to McFadden, the Attorney for the Institute, concerning this matter, Reiter said:

"Dealers are very much interested. Mr. MacQueen has called me from Pittsburgh regarding this matter and I understand that Mr. Frank Carnahan of your

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[2] Com. Ex. 1022 BB.

[3] Com. Ex. 1022 CC.

[4] Reiter (C) Tr. 4338.

[5] Com. Ex. 1022 GG.

[6] Com. Ex. 1022 II.

city has also had this matter brought to his attention by his constituents.'"[7]

Collins replied by wire stating that no awards would be made on this invitation.[8]

b. Oklahoma Procurement Division

On December 17, 1935 Reiter addressed the members of District No. 8, whose selling area includes Oklahoma, reporting upon a call which he and McFadden made on Captain Collins for the purpose of discussing the problem in Oklahoma. Apparently this division had been unable to procure any business from manufacturers but only from dealers. Reiter's letter states:

"Captain Collins has a general understanding of the marketing policies followed by some of the cement companies, and he indicated to us that it was his hope that there would be no difficulty about this or other situations. However, he frankly told us that his organization was subject to criticism if it appeared that all possible sources of purchase had been closed to it except certain limited dealer sources within a given area. He hoped that this situation would not develop to the point where the Government would feel that its hands were so tied that it would have to take drastic action for correction.

Captain Collins further indicated that if anyone desired or expected that the Government should publish detailed rules regarding the sources of purchase they should be disillusioned, as this was something that could not be done and which the Government would not undertake.

He frankly stated that he had no present reaction to the Oklahoma situation, but that he found it somewhat disturbing, and he hoped that it could be worked out expeditiously for everyone.

Captain Collins, of course could not foresee what his judgment would be after he received reports

[7] Com. Ex. 1022 JJ.

[8] Com. Ex. 1022 LL.

from Oklahoma, but it is probable that he will consult with us if any unsolved problems remain.

We discussed this situation with Mr. Frank Carnahan, Secretary of the National Retail Lumber Dealers Association, and we showed him the file of clippings on the Oklahoma situation. It was the first time that Mr. Carnahan had heard about this problem but he took an immediate interest and, in our presence, put in several long distance telephone calls to get at the facts.

Mr. Carnahan feels a personal responsibility to see to it that there is no abuse of the friendly relations which exist between the dealers and the Government on the one hand and the dealers and the cement manufacturers on the other hand. He indicated that, insofar as this situation indicates any dealer responsibility he will do everything that he can to straighten out the situation and remove any possible source of difficult public relations. Neither the dealers nor the cement manufacturers are willing to see their business sacrificed either because of misleading reports or because of mistake or folly on the part of certain individuals.

Mr. Carnahan is very widely respected in Washington, and we feel sure that he will act aggressively and fairly in matters of this sort. He has promised to keep us informed, and we would appreciate it if each of the companies in District 8 will do likewise.

The Oklahoma situation frankly has caused something of a stir, and while it is not yet settled we have every reason to hope that it will be soon."[1]

c. Mississippi Procurement Division

Mississippi Procurement Division invited everybody to bid. McNair, the Mississippi Procurement Division Officer, testified that his office sent an invitation to bid on October 31, 1935 upon 1620 barrels for delivery at Rolling Fork,

[1] Com. Ex. 1022 RR-SS.

which was a relatively high quantity for his office, to 107 concerns, manufacturers and dealers.[1] McNair testified:

> "Q. On 1063 A, I observe that you sent invitations to California. Was it the practice on Procurement Division work in the State of Mississippi, to solicit manufacturers as far away as California? A. No, sir; it was not.
>
> Q. Why was it done in this case? A. We had been unable, except for the two cases I covered, to obtain bids from manufacturers and we decided to set up a test case and send invitations to all cement dealers and manufacturers.
>
> Q. Did you think that would be a test case, shipping cement all the way from California to Mississippi? A. We tried—we wanted to see what we would get.
>
> Q. To see what you could get, you sent to all dealers in the country to see if they would answer? A. Yes, sir.
>
> Examiner Norwood: That exhibit is a list of those manufacturers and dealers to whom the invitations went?
>
> The Witness: Yes, sir.
>
> Mr. Zimmerman: This seems to be a list of all the manufacturers of cement in the country.
>
> The Witness: I would not say it is all. It is all we had listed in our files.
>
> Mr. Zimmerman: As many as you had names of?
>
> The Witness: Yes.
>
> Mr. Wooden: This seems to be another case of entrapment."[2]

The only responses received on this invitation were from one dealer in Rolling Fork, Mississippi, where the cement was to be used, and one dealer in each case of three towns within a radius of fifteen or twenty miles of Rolling Fork.[3]

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[1] Com. Ex. 1063 A.

[2] McNair (C) Tr. 4973-74.

[3] Id., Tr. 4977.

d. Arizona Procurement Division awards 45,000 barrels on invitation to bid on 3,000 barrels

In December, 1935 Monolith wired Reiter that the Arizona State Procurement Officer at Phoenix, Arizona, had issued a bid for 3,000 barrels of cement, f.o.b. Phoenix, Arizona; that 15 dealers had bid thereon and that the officer had apparently placed 15 orders, each for 3,000 barrels with each dealer on the basis of the Phoenix destination price, less commercial freight rate from point of origin, for shipment to other destinations in Arizona. As a result, Monolith received orders from three different dealers in Phoenix for a carload delivery to Globe, Arizona, one carload to Tucson and six carloads from six different dealers to Phoenix. The telegram asked for Reiter's advice.[1] Reiter wired in answer:

> "HANDLING OF THIS MATTER DEPENDS ON COMPANIES OWN SALES POLICY AND WE ARE NOT ADVISED CONCERNING YOUR OWN HOWEVER ALL SALES POLICIES WITH WHICH WE ARE FAMILIAR PROHIBIT SALE TO DEALER AT ANOTHER DEALERS TOWN AND GENERALLY PROVIDE FOR SALE TO DEALER AT HIS OWN DESTINATION STOP THUS DEALER TAKES TITLE AT HIS DESTINATION AND CORRESPONDINGLY IS APPARENTLY REQUIRED IN TURN TO TRANSFER TITLE TO ALL CUSTOMERS INCLUDING GOVERNMENT AT HIS DESTINATION STOP WE HAVE DISCUSSED SALE TO GOVERNMENT BY DEALERS AT OTHER DEALERS DESTINATIONS WITH OFFICERS OF BOTH NATIONAL DEALERS ASSOCIATIONS AND SEVERAL STATE DEALERS ASSOCIATIONS AND ALL AGREE WITH US THAT THIS IS BAD PRACTICE LEADING TO DESTRUCTION OF DEALERS BUSINESS AND DIRECT SELLING BY MANUFACTURERS NOT CONTEMPLATED BY CEMENT COMPANIES POLICIES OR DESIRED BY DEALERS STOP WE ARE TAKING LIBERTY OF SENDING COPY THIS TELEGRAM TO ALL COMPANIES WHO HAVE FILED FOR PHOENIX"[2]

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[1] Com. Ex. 1022 NN.

[2] Com. Ex. 1022 OO.

4. The Institute and Company Policies in Respect of PWA Sales

On May 1, 1936, Stearns Coal and Lumber Company of Stearns, Ky., wired the Institute that R. J. Smith Company of Somerset, Ky., had accepted a PWA order for a carload of cement to be delivered in Stearns and continued, "This is our territory and we expect protection from you under Bulletin 11."[1] Reiter replied in the name of The Cement Institute the same day "The Cement Institute has nothing to do with these matters Stop Suggest you take up with companies with whom you do business."[2]

On May 23, 1936 Slagle, Secretary-Treasurer of the Indiana Lumber & Builders' Supply Association wrote to Carnahan, Secretary of the National Lumber Dealers' Association, complaining that under sales made by Aetna to the Indiana Farm Bureau that organization was preempting sales of cement for PWA work throughout the State of Indiana and asking for relief. Slagle's letter stated:

> "The State Procurement Officer, United States Treasury Department, in purchasing materials for the various jobs throughout the State is doing all he can to buy materials out of the State direct. In the case of portland cement, it is simply disrupting the entire market to such an extent that it is necessary for us to have some sort of relief.
>
> As you perhaps know the Indiana Farm Bureau has made arrangement to purchase cement from an out of State mill, the Aetna Portland Cement Company, of Michigan, who are the only ones who would make this connection. The Farm Bureau has five yards in the State but under the arrangement made with the Aetna Company they will quote on carload cement business any place in the State of Indiana. They have made an arrangement with the State Procurement Officer to receive invitations to bid in the

[1] Com. Ex. 202 CC.

[2] Com. Ex. 202 BB.

entire State and with this arrangement are taking practically all of the cement business.

We take the stand that this cement should be purchased from local retailers where the project is located inasmuch as the local retailer has an investment, pays taxes and employs people in that community. Under the set-up all of it goes outside of the State.

If you can give us any help on this it would certainly clear up a bad situation. At the same time I would welcome any suggestion as to what we could do in Indiana to bring pressure to bear on the State Procurement Officer to get him to change his set-up."[3]

Carnahan sent a copy of this letter to Reiter and said:

"Before I handle this matter with Captain Collins, will you please advise me in regard to the Aetna Portland Cement Company. Will you also please let me know if you have any suggestions for remedying this situation."[4]

Writing to Carnahan in reply, Reiter stated that the matter was outside the province of The Cement Institute. He wrote:

"This will acknowledge your letter of May 25 concerning sales of the Aetna Portland Cement Company to the Indiana Farm Bureau for resale to the Indiana State Procurement Office of the U. S. Treasury Department.

I am afraid that I can offer no suggestions. Individual sales policies of cement companies usually do not include sale of cement to a dealer f.o.b. another dealer's destination, but the matter you call to our attention is outside the province of The Cement Institute.

I am also quite doubtful if Captain Collins can assist you in this matter whatever the merits of the situation may be."[5]

[3] Com. Ex. 202 AA.

[4] Com. Ex. 202 Z.

[5] Com. Ex. 202 Y.

Again, replying on June 15, 1936 to a letter from M. Lain, Manager of the Kansas City Division of The Cement Institute, concerning a communication from Monarch in relation to Procurement Division purchases, Reiter stated:

> "My suggestion to any cement company receiving such a letter is that they reply to it frankly, fully explaining their individual sales policy and possibly enclosing a copy of such policy as distributed to their trade, if helpful in answering this inquiry."[6]

The Trial Examiner asked Reiter whether company sales policies were announced by him, and he replied:

> "No, sir, they were announced by the companies themselves to their trade."[7]

5. Substituting Government Bills of Lading for Commercial Bills

In the latter part of 1935 and early in 1936 Procurement Division officers in Mississippi and Georgia whose work was on land grant railroads attempted to secure the forwarding of cement bought from dealers on Government bills of lading. The land grant rate effected a saving over the commercial rate, but the legal obligation to allow the lower rate ran only on property owned by the Government at the time of shipment and in these cases the cement to be forwarded belonged either to the manufacturer or the dealer.

Harman, State Procurement Officer for Georgia identified an invitation to bid on which the following clause had been written in in typewriting:

> "Transportation Allowance, at lawful rates published and on file with the Federal or State Commissions, to be deducted from bid price, in the event

[6] Com. Ex. 202 V.

[7] (C) Tr. 3492.

the Government elects to furnish Contractor with Government Bill of Lading or to accept material F.O.B. cars at point of shipment for delivery at specified point or nearest rail siding to Government Project, at point of destination. State shipping point'"[1]

Harman testified that this was a standard form in use by his office prior to February, 1936.[2]

Captain Collins condemned the substitution of Government bills for commercial bills of lading after the award had been made in the following bulletin:

"December 26, 1935

PROCUREMENT DIVISION BULLETIN S.P.O. No. 59

To: STATE PROCUREMENT OFFICERS

Subject: Invitations to Bid

It is noted that State Procurement Officers are issuing Invitations to Bid for materials and supplies, particularly cement, for delivery f.o.b. project then later accepting alternate bids f.o.b. plant and issuing Government Bills of Lading for shipment of material.

The above indicated procedure does not meet with the approval of this office.

It is desirable in all instances that State Procurement Officers determine, prior to issuing of Invitations to Bid, how and where delivery will be required on requisitioned material.

Please give this your attention.

H. E. Collins
Assistant Director of Procurement'"[3]

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[1] Com. Ex. 1047 C.

[2] (C) Tr. 4788-89.

[3] Com. Ex. 1046.

Again, on January 6, 1936, Collins issued Bulletin No. 72, in which, after stating that attention had been drawn to numerous instances of invitations to bid f.o.b. destination with a clause similar to that above quoted, he continued:

> "Efforts of State Procurement Offices to reduce costs by proper means are commendatory and are encouraged, but there is serious doubt of the propriety of the measures described in the preceding paragraph. *Deductions account of land grant can be made only on transportation charges on Government property. The title to property purchased by the Government under contracts calling for delivery f.o.b. destination does not pass to the Government until arrival of the material on cars at the usual place of delivery at the destination named in the contract. Any attempt to change the terms of purchase after the award of contract for the purpose of securing benefit of land grant deductions on transportation charges is subject to misinterpretation and must not be permitted. At best, there is reasonable doubt that deduction of commercial freight* charge from vendors' invoices and the issuance of Government bills of lading, or substitution thereof for commercial bills of lading where invitation to bid and award of contract provide for delivery, f.o.b. destination, has the effect of vesting title in the Government at point of origin.
>
> The practices heretofore followed and described herein will be discontinued immediately. For the future, State Procurement Officers will make provision for award of contracts f.o.b. point of origin in cases where economy can be effected in transportation costs by means of land grant deductions from commercial rates. In cases where material will originate at and be destined to points between which no land grant is available, purchases will be made f.o.b. destination, shipments to move on commercial bills of lading and transportation charges to be paid by vendor."[4]

[4] Com. Ex. 374.

a. In Georgia

Nevertheless, Harman, Georgia Procurement Officer sent a letter on January 15, 1936 to Hayghe, Chief of the Traffic Section, Procurement Division, referring to six bids opened in the Georgia office between December 30, 1935 and January 13, 1936, in which he stated savings on these bids by use of Government bills of lading ranged from $28.16 on one bid to $266.96 on another. He then went on to say that the office had requested representatives of the cement companies to appear and discuss the matter and that a meeting had been held with Wilkerson, representative of Penn-Dixie, Tucker of Alpha, Dannelly of National and Conkling of Signal Mountain and one or two others whose names he did not recall. He continued:

> "Messrs. Wilkerson and Conklin acted as spokesman for the cement concerns, and advised us that at the meeting in Washington, pertaining to the sale of cement to the Government it was decided this territory belonged to the dealers. In other words the cement was to be purchased from the dealers and not from the cement companies direct. This, of course, meant that the dealers would bid on the cement and cement manufacturers would ship to the dealers on commercial bills of lading, and the cement manufacturers contended that a commercial bill of lading only should be used. But, they could readily see our position when the cement was moving from land grant territory that we desired to take the benefit of such land grant, but the cement companies were not selling to the government but to their dealers. This is true, but when the dealer puts in his bid to the Government, signs same, and is willing to live up to the transportation Clause, then the Government is dealing with the dealer and not the Cement Company. And if we desire to take benefit of land grant then we have the option of accepting a bid F.O.B. point of origin, issuing Government Bills of Lading, and deducting the commercial freight from the dealers invoice. It makes no difference whatever to the dealer, as far as the actual

money is concerned, because he would pay the freight and deduct it from the invoice, whereas the Government would pay the freight on a government bill of lading, based on the land grant rate and deduct from the dealers invoice the commercial freight. The cement companies were of the opinion that inasmuch as they were not permitted to bid direct that the dealer should be protected and the cement permitted to be moved on commercial bills of lading. Do not overlook the fact that these dealers show the shipping points as their home town when in reality this is not the shipping point because they do not have the cement in stock, and have to buy it, and in many instances, after a purchase order is issued, the dealer places the order with the cement company, and has the cement consigned to the project involved, and not to himself, and simply pays the freight, and releases the car to the project superintendent or representative in charge.

This manner of procedure is absolutely wrong in our opinion, because if the shipments move from land grant territory we feel we are entitled to take advantage of the land grant route and rates, and you can see from the figures above just exactly how much money we would have saved on these shipments had we been in position to issue Government Bills of Lading.

In view of the Procurement Division Bulletin, S.P.O. 59, and the letter written to Mr. Collins under today's date (copy attached) you will, no doubt, desire to talk with Mr. Collins on the subject, and set us straight as to whether or not we are to issue Government Bills of Lading. Of course, it is impossible to tell whether a Government or Commercial Bill of Lading will be used until the sealed bids are opened, and we know the shipping points, and we do not see how we can make our Invitation to Bid more explicit than to ask for prices F.O.B. Destination with the transportation Clause inserted in it.'"[1]

[1] Com. Ex. 1049 A-D.

Wilkerson reported on this meeting to his superior, Wing.[2]

Dannelly, Vice President, National testified about this meeting, but his recollection of it was altogether vague.[3] Harman, discussing the meeting, testified:

> "A. Well, from time to time I would have the cement representatives in my office asking about these things, and they said they could not ship it on those bills of lading. We just had informal gatherings.
>
> Q. You said you had meetings with representatives of the cement companies? A. Yes, sir. We just discussed the things informally. I have known them all my life."[4]

As to the outcome, Harman testified that the manufacturers' representatives failed to explain why they could not bid point of origin and nothing was accomplished. Harman testified that in one case where a dealer did not have money to pay the commercial freight, "he had to let us substitute from Tennessee on the land grant and we saved $900 and some odd on that one shipment."[5] Harman identified a letter from a dealer who was a successful bidder but who, after the bid was ordered, was unable to secure the cement on a Government bill of lading and therefore asked permission to have it forwarded on a commercial bill.[6] On the other hand, in a letter to Hayghe on January 31, 1936, Harman wrote about a delivery of 25 cars which were changed from commercial to Government bill of lading, on which the Government saved $953.80 from Cowan, Tenn. to Savannah, Ga.[7] Harman testified that

[2] Com. Ex. 202 T.

[3] (R) Tr. 39656-62, 39717-18.

[4] (C) Tr. 4797.

[5] (C) Tr. 4803.

[6] Com. Ex. 1050 B.

[7] Com. Ex. 1048 A-B.

less than 10% of the cement purchased by his office was purchased from manufacturers.[8]

b. In Mississippi

McNair, the State Procurement Officer for Mississippi, stated that he purchased 220,000 barrels of cement for the work of his office between July, 1935 and 1938. He testified:

> "The Witness: On the 220,000 barrels of cement, had it been purchased at the point of origin,—and that, we figure, is Birmingham, Alabama for the State of Mississippi,—we figure that the estimated saving to the government on account of land grant rates would be 6 cents per hundred weight, and, on the 82,720,000 pounds of cement purchased, that would total $49,632."[1]

This saving, had it been effected, was equivalent to 1/6 of a mill per pound.

On January 16, 1936, McNair wrote to Captain Collins recommending that his office be granted authority "to substitute Government bills of lading in lieu of freight charges at destination deducting commercial freight from the purchase order issued to the vendor, Wood, Lumber and Material Company."[2] McNair received telegraphic reply that there was no objection to converting commercial bill of lading to Government bill of lading.[3]

In this case the dealer, Wood, Lumber and Material Company, did not have the cement in stock and was ordering it from Alpha. Upon the dealer's request to Alpha to allow the shipment to proceed upon a Government bill of lading, Alpha refused to do so.[4]

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[8] (C) Tr. 4850.

[1] (C) Tr. 4941.

[2] Com. Ex. 1061 A.

[3] Com. Ex. 1061 D.

[4] Com. Ex. 1061 F.

Examined upon Alpha's reason for refusing to permit the substitution of Government for commercial bills of lading, Coogan, Vice President of Alpha, testified:

"Q. * * * has the Alpha Company refused to exchange bills of lading so that the Government would have the benefit of land-grant rates on shipments made through the dealers? A. Yes, the Alpha Company have always declined to have any part in exchanging commercial bills of lading for Government bills of lading.

Q. What is the reason for that policy? A. Well, our reason is because we would have to misrepresent the sale. The sale was made to the dealer at a destination price, and if we go in and exchange it for a Government bill-of-lading we have got to say that the title passed at the mill, which it did not, and we refused to be a party to it.

Q. Are you trying thereby to protect the dealer, or what is your objective? A. Well, we are all trying, as far as possible, to protect our dealers' customers; on the other hand, we refuse to have any part in anything that will, to our mind, be a matter of misstatement to the railroads.

* * *

Q. I take it from that, Mr. Coogan, that you would refuse to be a party to the exchange of bills-of-lading even though the dealer were willing?

* * *

A. I would refuse to be a party to anything that would be a matter of fraud and deception on our part—in representing to the carriers, a condition different from what existed.

By Mr. Wooden:

Q. Would you also refuse to be a party to the exchange of bills-of-lading even though the carrier were willing as well as the dealer? A. If we had to make any statement in connection with it, yes.

Q. On whom would the fraud and deception be?

* * *

A. On the railroad.

By Mr. Wooden:

Q. Wherein would there be any fraud and deception on the railroad company? A. Why, they would be moving their shipment on land-grant rates which we sold based on commercial rates.

Trial Examiner Norwood: If you sold it f.o.b. you wouldn't be basing it on commercial——

The Witness: They are not referring to sales that we made f.o.b. They are referring to sales that we made at destination prices.

Trial Examiner Norwood: Yes. Well, I beg your pardon.

By Mr. Wooden:

Q. Wherein is there any fraud or deception on the railroad company for a shipment to move on a land-grant rate rather than on a commercial rate? A. Well, because they are getting just half the money for moving it, and we have got to represent that the title passed at the mill in order to get a Government bill-of-lading.

Q. As a matter of fact, you do pass title to the Government at the mill when you sell at destination, don't you? A. When we sell direct to the Government, yes.

Q. Well, then, what bearing does that have upon your refusal to permit the exchange of bills of lading? A. Because it wasn't sold that way, wasn't one of the terms of sale. In selling to the Government it was one of the terms of sale.

Q. And that, in turn, is in support of your policy of refusing to sell f.o.b. mill to the dealer? A. It had nothing to do with that at all. I am telling you, that we refused, after we had quoted and made a sale at a destination price, we refused to represent that we had sold it at a mill price.

* * *

Q. Is it your testimony that you have no reason in refusing to participate in the exchange of bills-of-lading except your desire to avoid participation in

what would be a fraud and deception on the railroad company?

* * *

A. That, and it violates our terms of sale on which that particular sale was made.

By Mr. Wooden:

Q. And it also violates your policy with regard to selling f.o.b. mill; isn't that correct? A. Well, we have made mill prices to the Government.

Trial Examiner Norwood: Does it or does it not?

The Witness: Well, we don't sell f.o.b. mill to dealers; we sell f.o.b. destination.

By Mr. Wooden:

Q. Then it would violate that policy to permit the exchange of bills-of-lading, would it not? A. Well, that's getting into a very intricate question. I don't know."[5]

On January 22, 1936 Browder, Traffic Manager of Penn-Dixie, wrote to Reeves, General Freight Agent of the Illinois Central, drawing attention to a shipment of two carloads from Penn-Dixie's mill at Richard City, Tennessee, consigned to Works Projects Administration, Centerville, Miss., for the account of a dealer at Centerville, sold f.o.b. destination, and advising that the memorandum copy of the bill of lading and shipping order bore the legend "This is the property of the shipper and no reconsignment or diversion is to be made unless authorized by the consignor." He advised that the Mississippi Procurement Officer intended to exchange the bill of lading at destination for a government bill of lading, for the purpose of securing a land grant rate, and he understood that under the law the land grant rate was not applicable, since the bill clearly stated that the shipment was the property of the consignor and requested that the railroad wire its agent

[5] (R) Tr. 24976-85.

at Centerville instructing him not to make the exchange of bills.[6]

Browder corrected his letter by wire to advise that the shipment was consigned to L. E. Roberts and not to the Works Projects Administration.[7]

One Stein acknowledged these communications for the railroad and advised that the agent at Centerville, Miss., had been instructed not to make the exchange.[8] Stein wired Browder on the 29th, referring to the demand by the Procurement Agent for exchange of bills and advising that unless the exchange was allowed, delivery would not be accepted, adding, "WIRE YOUR CONCURRENCE PERMIT OUR HANDLING AS DESIRED BY WPA."[9] Browder replied by wire:

> "DO NOT UNDERSTAND THAT OUR CONCURRENCE HAS ANY BEARING WHATEVER ON THIS MATTER ONLY QUESTION IS WHETHER OR NOT LAND GRANT RATE LEGALLY APPLICABLE AND MY UNDERSTANDING ONLY APPLICABLE WHEN PROPERTY OF GOVERNMENT AT POINT OF ORIGIN."[10]

Browder wired again on the 31st to General Freight Agent Trovillion restating the issue and saying:

> "WE WILL NOT BECOME PARTY TO ILLEGAL EXCHANGE OF BILL OF LADING."[11]

On the same day Browder received a wire from the railroad stating that the agent at Centerville had been advised to make delivery on a commercial bill only, and stating:

> "GOVERNMENT NOT ENTITLED TO LAND GRANT RATES."[12]

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[6] Com. Ex. 2135.

[7] Com. Ex. 2136.

[8] Com. Ex. 2138.

[9] Com. Ex. 2140.

[10] Com. Ex. 2139.

[11] Com. Ex. 2143.

[12] Com. Ex. 2144.

A departmental communication by the railroad to its New Orleans agent, a copy of which was sent to Browder, stated:

> "I handled this subject with our Legal Department for opinion and was advised that as these shipments were made for the account of a building material dealer at Centreville, Miss., and sold on a delivered basis, the Government is not entitled to Land Grant deduction."[13]

However, on February 7, the railroad wrote Browder:

> "We know from past experience that the Government invariably awards contracts on delivered prices and then issues Government Bills of Ladings covering the movement of shipments in order to secure the benefit of land grant rate. On these particular shipments there was some misunderstanding due to the fact that we were advised that shipments were bought by L. E. Robert as a dealer in Centreville, Miss., who later sold this material to the WPA. However, further investigation develops that L. E. Roberts purchased this cement for the WPA and the commodity was to be used on a Federal WPA project in the State of Mississippi, and that Mr. Roberts is employed by the WPA as General Supervisor over the project at that point.
>
> In view of the fact that Section 22 of the Interstate Commerce Act, allows the railroad to make any rate they desire on Government shipments, I would thank you to advise whether or not you still object to the railroads converting this commercial lading into a Government lading and if so the reasons for any objections which you may have."[14]

On February 8, 1936 the Illinois Railroad wrote to Myers, Traffic Manager for WPA at Jackson, Mississippi:

> "We are still endeavoring to straighten out the mixup which occurred covering two shipments of

[13] Resp. Ex. 98.

[14] Com. Ex. 2147.

> Cement by the Penn Dixie Cement Co. from Richard City, Tenn. to Centreville, Miss. and we have this day addressed letter to the Traffic Mgr. of the Concern in New York, requesting advice as to any objections which they may still have to our agreeing to convert these commercial ladings into Government ladings. The IC. is agreeable to this conversion if the shipper has no objection, as you know that the Railroads in General and the I.C. in particular are very liberal in their interpretation of agreements providing cheap rates on Government freight."

The letter then cited three instructions relating to the transportation of supplies and equipment under the Emergency Relief Appropriation Act of 1935 which, according to the letter, appeared to be in conflict with each other.[15]

On February 13 Browder wrote the railroad referring to provisions of the Interstate Commerce Act and the conditions of the shipment and stating:

> "However, I again wish to repeat that our concurrence in or our objections to any thought you might have as to protecting the land grant rate or exchanging the bill of lading has no bearing whatever on this matter, as the only question involved is whether or not the land grant rate can be legally applied on a shipment which does not become the property of the Government until after it has arrived at destination. I also wish to repeat that we will not become a party to what we consider the illegal exchange of the bill of lading and protection of the land grant rate on these shipments."[16]

The closing step in this issue of the use of land grant rates was a publication on March 11, 1936 of the Procurement Division amending its SPO No. 72.[17] This amend-

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[15] Com. Ex. 1052.

[16] Com. Ex. 2148 A-B.

[17] Com. Ex. 374, *supra*, p. 2419.

ment stated that in order to comply with instructions, it would be necessary to request prices f.o.b. point of origin, bidder to specify shipping point and f.o.b. destination and then if a land grant rate was available, to accept the bid f.o.b. point of origin, if the price, plus the land grant rate, affected a saving of more than 5% over the destination price. The amendment continued:

> "If no bids are received f.o.b. origin, or if no land grant is available between shipping points named by bidders and the destination, contract will be let f.o.b. destination, shipments to move on commercial bills of lading and transportation charges to be paid by vendor."[18]

Reiter, General Manager of the Institute, in reporting to the Board of Trustees on December 17, 1936, wrote:

> "*U. S. Procurement Division.* The Institute has found it advisable both for the benefit of its members and at the request of this Federal Department to continue its contact with the Procurement Division of the Treasury Department on general matters affecting our Industry. This means merely this: The General Manager gives or seeks information about the Industry whenever desired by the Procurement Division; he also disseminates to the Industry information secured from the Procurement Division."[19]

6. Emergency Relief Sold Direct

In spite of the demands of dealers and the prevailing practice, there is evidence throughout the record of a substantial volume of sales direct to emergency relief projects throughout the period of such projects.

[While Article XI was in the Cement Code, the Code Authority held that purchases made directly by the relief

[18] Com. Ex. 375.

[19] Resp. Ex. 127 A-D.

agencies should be sold to them, while purchases made by their contractors should be sold to the contractors or the dealers.][1]

Reiter testified that WPA "got quite a few bids" direct from manufacturers.[2] Penn Dixie, Universal Atlas and Lehigh sold WPA direct in 1935 to 1936.[3] Kosmos and Nazareth bid direct to WPA in 1935.[4] The evidence also shows the following emergency relief work projects sold at the times indicated:

Project	Date	Number of Bidders	Reference
CWA			
Pipe Creek, Ohio	2/15/34	2	Com. Ex. 978 A.
Federal Emergency Administration of Public Work Project			
Grand Coulee	8/20/35	7	Com. Exs. 112, 113
Boulder Dam	3/26/34	6	Com. Ex. 134
PWA—all projects	2/24/34	1	Resp. Ex. 3183 R, S
Emergency Relief Administration			
Tucumcari, N. Mex.	4/23/36	11	Com. Ex. 175 A
WPA			
Allentown, Pa.	12/11/35	1	Resp. Exs. 1614-15
Hamilton and Arnold Dam, Beverly, Texas	2/10/36	4	Com. Exs. 117, 115 H

[1] Resp. Ex. 3183 D-E: Letter 1/13/34, Code Authority to Holmes of Yosemite; Letter 1/11/34, Holmes to Code Authority.

[2] (C) Tr. 3491.

[3] Alexander, President, Missouri (R) Tr. 37401.

[4] Horner, President, Kosmos (R) Tr. 36968.
Resp. Ex. 1614: Letter 12/16/35 Erich Company to Nazareth.

Project	Date	Number of Bidders	Reference
WPA			
Huntsville, Ala.	9/22/36	9	Com. Ex. 338 D
Groveland, Fla.	11/23/36	8	Com. Ex. 334 B
St. Peterburgh, Fla.	12/21/36	5	Com. Ex. 336 C
Gadsden, Ala.	12/14/36	10	Com. Ex. 339 J
Red Bay, Ala.	12/16/36	9	Com. Ex. 337 K
Brooksville, Fla.	1/27/37	8	Com. Ex. 335 C
Inverness, Fla.	9/17/37	1	Com. Ex. 1058 A-C
Will sell Treas.—Proc. direct	12/21/37	1	Com. Ex. 332
Scottsboro, Ala.	1/10/38	9	Com. Exs. 363 C, 1054 A-3C
Scottsboro, Ala.	1/24/38	9	Com. Ex. 1055
Alpena Pass, Ark.	8/26/38	3	Com. Ex. 2616
Malvern, Ark.	8/29/38	3	Com. Exs. 2615; 2617
PWA			
Yellville, Ark.	8/30/38	3	Com. Ex. 2614 Resp. Ex. 94
Pocahontas, Ark.	9/19/38	1	Com. Ex. 2613
W. Virginia	since 3/20/39	7	Resp. Ex. 2317
Spencer, W. Va.	4/ 5/39	5	Resp. Ex. 2318 A-B
Wayne, W. Va.	4/ 5/39	6	Resp. Ex. 2318 C-D
Huntington, W. Va.	5/ 5/39	1	Resp. Exs. 2315, 2312, 2314, 2313

Nelson, Vice President of Wolverine, testified that cement used on WPA work would ordinarily be supplied through the local dealers and continued:

"A. Well, I know this, that if I started selling them direct that I would hear plenty from them, because

it has been our practice, and we are continuing on that practice, and I have talked to a great many dealers personally, and I know from my own conversations with them that they look upon that as their business.'"[5]

E. Dealer Price Protection.

Price protection to dealers has been of several types: trade discounts, price differentials, and undertakings by manufacturers to protect dealers on particular purchases going directly to contractors at such mark-up as the dealer may care to put upon the order.

1. Early Association Treatment of Price Protection

[The North American license agreement which existed from 1909 to 1911 provided for a 5¢ per barrel trade discount to dealers and a 10¢ per barrel trade discount to distributors.[1]

The minutes of the quarterly meeting of the Association of American Portland Cement Manufacturers in April 1908 contain a discussion of the differential between jobbers and dealers by the President in which he attacked the practice of setting up a dealer as a distributor and giving him the full discount.[2]

The minutes of the quarterly meeting of June 1909 contain a statement by one of the company representatives that "The dealers are protected to the extent of 5¢."[3]

Minutes of the meeting held in May 1915 contain a report of the Committee on Trade Conditions by Affleck of Universal, later President of the respondent Universal

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[5] (R) Tr. 36001.

[1] Com. Ex. 3196 SS-UU.

[2] Com. Ex. 3235 Z-30-Z-33.

[3] Com. Ex. 3235 Z-45.

Atlas, condemning the conduct of dealer business in such a way that the dealer was unable to make a fair profit and was, therefore, not properly interested in the promotion of cement sales. The report said:

> "Some of the companies have for some time been encouraging dealers to so handle their business as to make a fair profit on cement. In many cases it has been found that dealers handled cement practically without a profit; they handled it because there is a demand for it and they are obliged to, but didn't expect to make any money on it. Under those conditions cement manufacturers cannot expect any creative building up on the part of the dealer of the consumption and the proper use of the cement. I think it is conceded that we will sell more cement, more cement will be used, and it will be used better, and give better results, if the dealer who buys and sells it is making a profit on it, so he can put his heart and soul in it and transact that branch of his business with a feeling that he is getting paid for his work. That being conceded, it can readily be understood that where, by reason of competition between two cement companies, one salesman goes out and induces his dealer to shrink his profit to a point where he makes no money, the other salesman will be forced to do the same with his dealer. Where one man is trying to encourage the dealers to make a profit, and another goes at them and, and while he maintains his prices to the dealer, gets the dealer to shrink his profit, you create an unbalanced, undesirable situation."[4]

The report of the Committee on Trade Conditions published by the Association of American Portland Cement Manufacturers in 1915 discussing dealer differential and the importance of maintaining it in order to promote sales, said:

> "For some time past the custom has been to make prices to consumers and contractors at least five

[4] Com. Ex. 3236 Z-70-Z-71.

cents per barrel higher than to dealers. There is an insistent demand by dealers that this differential be greater than five cents per barrel. Generally speaking, the five cents per barrel differential has given fair satisfaction. It is believed that the principle of making higher prices to consumers and contractors than are made to dealers is correct, and that there has been a material improvement in the situation in territories where this practice has been followed. It is, therefore, believed that the practice should be general in all territories, and that all companies follow the same practice. In order to get the active and energetic assistance of the dealer in pushing the use of cement in competition with other materials it is necessary that the business be so handled that the dealer will get a margin of profit which is satisfactory to him and which will compensate him for his work. Unless this is done he will lose interest in cement and discourage its use in favor of other materials.

Therefore, the Committee recommends that it be established as a custom in quoting contractors and consumers to add not less than five cents per barrel to the dealer's price, and that the manufacturers use their best efforts to induce dealers to handle their cement business in such a way as to net them a fair margin of profit."[5]

Minutes of a meeting of the Cement Manufacturers Protective Association in March 1916 record a statement of Brobston, later the President of respondent Hercules, as follows:

> "All of the companies in this room here now and have for some time in the past had a trade custom of quoting dealers and contractors on different bases."[6]

The pamphlet "Trade Practices in the Cement Industry" published by the Portland Cement Association in January 1919 discussing dealer differential, says:

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[5] Com. Ex. 3193, p. 12.

[6] Com. Ex. 3234 D.

"In order to secure the active and energetic assistance of the dealer in pushing the use of cement in competition with other materials, it is necessary that the business be so handled that the dealer will get a margin of profit which is satisfactory to him and that will compensate him for his work. Unless this is done we will lose interest in cement and discourage its use in favor of other materials.

Recognizing these facts most cement manufacturers have for some time made a differential in price between dealers and consumers, first of five cents per barrel and later of ten cents per barrel, although in some sections of the country some manufacturers are still using the five cent differential.

It is clearly to the cement manufacturers' interest to use their very best effort to induce dealers to handle their cement business in such a way as to net them a fair margin of profit. One of the surest ways to accomplish this is to help dealers to inform themselves on the cost of doing business, a result of which will be to discourage them from selling cement for carload delivery on a smaller margin than ten cents per barrel."[7]

Bowen, Vice President of Lehigh, testified that his company had always made special effort to build and protect dealer trade. In pursuit of this policy it had a long and varied experience in trying to insure a profit to the dealer who would handle the Lehigh brand, in spite of the pressure from competition to endanger or destroy such a profit. Bowen testified at length to this experience for the years from 1915 to 1931. After explaining Lehigh's policy in 1914 and 1915 of making sales through dealers of all jobs requiring less than 5,000 and subsequently all jobs requiring less than 10,000 and finally 15,000 barrels, the company took a further step in the early part of 1915 for the protection of its dealers. Bowen's testimony continued:

"Q. What was that? A. That step was to make a definite announcement that throughout the entire

[7] Com. Ex. 3192, p. 4.

territory in which we did business our prices to contractors would be 5 cents per barrel higher than our prices to dealers, irrespective of quantity.

Q. How did that work out, Mr. Bowen, as far as your dealers are concerned?[1]

• • •

A. The policy was very acceptable to the dealers.

• • •

Q. As you have told it, Mr. Bowen, this seems to be your first general dealer protection plan; is that correct? A. It was the first time in which we had a policy which applied in exactly the same manner in the entire territory we covered.

Q. Now, going back to that time, can you tell me as to this first general dealer protection plan, whether or not your competitors followed it? A. As I recall it, most of them ultimately did, although it happened over quite a period of time.

We were greatly helped in establishing this plan throughout the eastern territory; making it successful, because at the time we published the plan prices throughout this entire eastern territory were extremely low. They had gone so low that only the Lehigh Company and perhaps one or two other companies were continuing to quote at the prevailing market price for both current shipments and future deliveries.

Most of our competitors were quoting the low price, only, for current delivery; quoting a somewhat higher price on future contracts.

It was possible for us, therefore, to quote contractors 5 cents per barrel higher than it was to dealers and still continue to get a considerable amount of contract business as against the competition of companies who were continuing to quote contractors directly. This fact helped us a great deal, in getting the plan established.

• • •

Q. Now, as to that, Mr. Bowen, did this new policy have any effect on the persons whom you rec

[1] (R) Tr. 26695-96.

ognized as dealers? A. Yes, from the time we adopted the policy it became necessary for us to distinguish between those customers who were dealers and entitled to the price we quoted dealers, and those whom we considered as contractors.

The problem was complicated by the fact that there were a good many buyers who belonged in both groups—that is, who were both dealers and contractors. It became necessary, therefore, and we have always since continued to have a conception of what constituted a dealer, the man who was entitled to the price we quoted dealers.

Q. Well, just why, Mr. Bowen? What was the purpose of defining a dealer? A. Simply that we might be able, in good faith, to apply the policy which we had announced, and which we had assured the dealers would be observed by our company.

Q. I see.

Well, how long did you maintain a 5-cent differential between consumer and dealer business? A. The 5-cent difference between dealer and contractor prices continued for about a year. In the early part of 1916, after costs had increased considerably and prices advanced a great deal, the margin was made 10 cents per barrel.[*]

• • •

Q. How was this increase initiated, do you know? A. I cannot say definitely that it was initiated by our company, or, as a matter of fact, by any other company. It developed principally out of the fact that in most markets by that time dealers, because of the higher prices of materials, were quoting 10 cents per barrel higher prices than their costs, and the manufacturers who were seeking dealer business made no effort to disturb those quotations by dealers.

Q. Well, now, you have told us about this general plan you had in, I think it was, 1914. Was there any other change? We will take during that period—during the war period, 1917—did you have any further change? A. We by 1917 we were in the war.

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[*] (R) Tr. 26697-99.

Prices were determined by the War Industries Board, and there were a great many restrictions on the use of cement, so that problems of dealer policies and the marketing plans were of secondary importance.

Q. Well, was there any later development in your policy after the war,—in the 1920 period, for instance? A. By 1920 we had a great car shortage, and extreme shortage of materials. This condition brought with it sharp increases in costs and sharply increased prices. It was a time in which the question of the buyer was how to get cement, and if a dealer could get deliveries he could readily get most any price within reason for them, so that during that time there were no great problems involved in matters of dealer marketing policies.

Q. And then after that time, after that period, what was the situation then? A. From 1921 on to about 1926 there was a period of tremendous development of highway construction. During the latter part of this period the 10-cent dealer margin broke down almost completely.

Q. Well, what do you mean? In what manner did the 10-cent dealer margin break down? A. Well, this was a period in which we felt, to a much greater extent than ever before in our experience, what we now readily recognized as a fluctuating market. There were a great many large highway projects coming up at isolated locations where the dealers were ill-equipped to handle the work, and where a question of the value of the dealer service was somewhat debatable.

A good many of our competitors who did not have as great a stake in the dealer business as we had encouraged their dealers to quote prices very much below the 10-cent margin. Sometimes a contractor might go to a man who was not directly engaged in the building material business and explain to him that if he would quote a low price he could get a very nice order, and having done so would sell the job through such a man as a dealer.

All of this affected our business quite adversely, but we had spent a good many years in building up our dealer trade. We had in most markets what we

thought was the best dealer, he was a man who knew his costs, who was not willing to do business except on a fair basis of profit; when he was unable to meet the competition in his market and lost business, we lost it, too.

There was a great increase in cases of this kind, and by 1926 we decided that the situation was such that we must make some change in policy if we wanted to hold our position.

Q. Well, what did you do, Mr. Bowen? A. During the summer of 1926 we adopted a new policy, which we called 'dealer discount method of selling.' It was merely a matter of quoting our prices with a condition that in addition to the usual cash discount we would grant the dealers a trade or dealer discount of 10 cents per barrel, which was not given to contractors when we sold contractors direct.[10]

* * *

Q. Now, do you recall, Mr. Bowen, how you introduced that plan? A. Yes, we introduced it by sending a statement to all our trade, and accompanied that statement by new quotations to which the new plan applied. In our western and southern territories those new prices were 10 cents per barrel higher than the prices we had just previously quoted to the trade, and with the additional 10-cent dealer discount the effect of those quotations was to give the dealer the exact same net cost for cement as he had had in our previous quotations before the plan was put into effect.

Q. I see.

What did you do in the East? A. In the eastern territory we proceeded somewhat differently because there we were confronted by a competitive situation arising out of the fact that some weeks earlier one of our competitors, the Lawrence Cement Company, had issued public quotations providing that its 10 cents per barrel cash discount would be granted for payment within 30 days from the dates of invoices, as compared to our discount period of 10 days.

We didn't want to accept that longer discount

[10] (R) Tr. 26699-702.

period if we could help it because we thought it was decidedly unsound.

Q. Well, why did you disapprove of this measure by Lawrence? A. Because we thought it would have increased our credit risks to a much greater extent than we wanted to face.

Q. What did you do then? A. In order to attempt to deal with that situation in the territory in which we were in competition with the Lawrence Company, we quoted our dealers the same prices as we had quoted them before and allowed the added 10 cent dealer discount from that price, the net effect being to have cement cost the dealer 10 cents per barrel less than it had cost him before.

At the same time we extended our cash discount period to 15 days from 10 days. Our object in doing this was to make it necessary for the Lawrence Company to make some move.

They might, conceivably, have met our prices and continued their discount period at 30 days, in which case it would have been up to us to decide again whether we wanted to meet their discount period or again move with our price; or they could meet our price and meet our discount terms. What they did do was the latter. They met our price and our discount terms and the situation ended the way we wanted it to.

Q. Well, was your action, the institution of this trade discount, any great change, any revolutionary change, in your marketing methods? A. No. It involved no great change in principle. It merely served as a means of giving the dealers an opportunity to get a fresh start. If they were strong enough and good enough merchants they could hold the full dealer discount for themselves, and if they succeeded in that we thought the policy would be most beneficial.

Q. Well, how did this trade plan work out? A. For a while it worked out quite satisfactorily, and our dealers were again able to get a goodly amount of contract business, but as time went on the old evils

again came into the field, and by 1929 or 1930 the situation was about as bad as it had ever been.[11]

• • •

Q. Why was Lehigh so concerned about that?

• • •

A. Because we steadfastly maintained the position that the dealer's function was an entirely separate and distinct thing from our function, and that any sale made by a Lehigh dealer must be one in which he carried out all those functions of handling the business, carrying the account, and of assuming the credit responsibility.

Naturally, our dealers, operating under that sort of restriction, were greatly handicapped in their efforts to get the larger contract business as against the competition of the sort I have described.

Q. Well, during that period, Mr. Bowen, did your company have any policy with respect to kinds of work you did sell direct and the kinds of work you did sell through dealers? A. No, we had no such policy because the dealer discount plan was based upon the principle that we were at all times ready to sell a contractor direct if he chose to buy, but we would not give the contractor the 10-cent dealer discount.

Q. Did you sell cement to any buyers other than dealers at the dealer prices? A. Yes. Again, the United States Government, State Governments, and railroads, were at all times, during that period, given the same discounts as were given to dealers.

Q. What about your competitors during that period of time? Do you recall whether or not they made any move relating to these discounts? A. Yes, I recall that during the summer or fall of 1929 one of our competitors, the International Company, [Lone Star] issued quotations to the trade which did not provide for any trade or dealer discount.

Q. And the Lehigh Company followed that International plan, in 1929? A. No, we did not.

Q. Why not? A. Because we had spent so much time and effort building up dealer business and had what we considered an outstanding position with re-

[11] (R) Tr. 26703-05.

spect to dealer business, we thought that the elimination of trade or dealer discount was bound to lead to general direct selling, and we did not want to face that sort of a situation without making every possible effort to prevent it.

Q. Well, what did you do? A. What we did was to devise and put into effect in November a new plan of marketing which was called a dealer service payment plan."[12]

The witness then turned to the so-called Lehigh's dealer service plan which caused so much concern in the industry in 1931 and led to the 1931 policy announcements by a number of manufacturers.[13] Taking up the dealer service plan, the witness continued:

"A. The essential features—the chief essential features—of the plan, I would say, were, first, the plan provided for payment to dealers at the end of each calendar year——

* * *

A. —five cents per barrel.

* * *

A. (Resumed)—on all the cement we had invoiced to the dealer during that year. This 5-cent per barrel payment was not to be in the nature of a profit, paid by the contractor to dealer, but was intended as a payment by us to the dealer in consideration of the dealer's service in providing us an outlet for our product.

The second feature of the plan, which I consider essential, was that our contracts provided that the 5-cent per barrel payment to the dealer was conditioned upon the dealer's representation that his sale to the contractor had been made at a price not lower than our price to the contractor had been for the same time and place.[14]

* * *

[12] (R) Tr. 26708-10.

[13] *Infra*, p. 2459 *et seq.*

[14] (R) Tr. 26713-14.

Q. Well, in what way, Mr. Bowen, did you believe, or anticipate, that the dealer service payment plan would operate more successfully than the trade discount plan?

* * *

A. We felt confident that the plan would be accepted by our dealers as giving them hope of a more profitable business than they had had before. We thought that with the dealers assured payment of a 5 cent per barrel from us, plus the additional profit that he might secure from the contractor, for service rendered to the contractor, that dealers generally would discover that the contract business was more attractive to them than it had been in the past. We hoped that the plan would be so accepted by dealers, and that a favorable reaction would lead to having many of our competitors, if not all of them, follow us in the acceptance of the plan, so that it might become successfully established.

Q. Well, what happened?

First, let me ask you: At the time that you introduced it was your price the same—was there any change in your price at that time? A. No. When we announced the plan, we—part of the announcement consisted of a quotation to the dealer in which we quoted a price which was slightly lower in its final cost to the dealer than our prices had been previously.

For instance, if our price at a given destination had been $2 per barrel, subject to the dealer discount, and the cash discount, that meant that the final cost of the cement to that dealer was $1.80 per barrel. To such a dealer our quotation under the new plan was at $1.92 per barrel, subject to the usual cash discount of 10 cents per barrel, and to the 5-cent per barrel service payment at the end of the year. That meant that the dealer had an immediate net cost of $1.82, and an ultimate net cost of $1.77.

Now, we felt that this difference would be sufficiently great that dealers would think that our price, with its accompanying deductions, was more attractive than the prices quoted by our competitors, and that that would compel our competitors to make some sort of a move. We hoped that that move would be to accept our prices and to accept the

method that we had announced, but, in any event, we felt confident that our level of prices would require some sort of a move on the part of our competitors.

Q. What did happen, Mr. Bowen? A. The plan met with a rather mixed reception. Some dealers were heartily and enthusiastically in favor of it; some recognized it as being an improvement over the conditions under which they had previously been working; but other dealers criticized the plan quite strongly because, we felt, that they misunderstood its purpose and the way it operated. A good many of our competitors followed our prices and adopted our plan. A good many others did not adopt the plan. Some of those competitors made reductions in their prices, continuing to offer the dealers the dealer and cash discount as they had theretofore, and we found ourselves in a position where we had to make some move.[15]

• • •

Q. How did this dealer service plan work out, from your viewpoint, Mr. Bowen? A. It led to a very confused condition that continued for some months. • • •

• • •

A. The problem with which we had to deal was whether we would retreat from a policy in which we very strongly believed, or whether we would make further efforts to have that policy become established.

We decided that we did not want to give up the policy without making further efforts, and during the following three months made a number of price reductions which involved meeting the prices published by our competitors subject to the dealer or trade discount, but continued to have each one of our prices subject to the additional 5 cents per barrel payment at the end of the year.

• • •

Q. Mr. Bowen, did there come a time when you finally abandoned this plan? A. Yes. By March of

[15] (R) Tr. 26715-17.

1931 we had reached the conclusion that the plan couldn't hope to be successful. We had tried every way we knew how to enlist sufficient dealers for it to endeavor to press our competitors to follow the plan, but that hadn't worked out.

Many of our competitors who had at one time adopted the plan discontinued it and others never adopted it. We just felt we couldn't go on with it any further.

Q. What discounts did you allow after March 16, 1931? A. After March 16, 1931, we allowed only the cash discount of 10 cents per barrel with no additional deductions.

Q. Well, now, after you abandoned this plan, what did you do with your dealers, Mr. Bowen? A. We merely followed the statement made to the dealers in March of 1931 which, in its general terms, assured the dealer that we would protect him to whatever extent our competitors might permit.

Q. How much did this dealer plan cost you, then? A. Well, we figured that the various price reductions we had made from November of 1930 to late February of 1931 had cost us several million dollars. We had let the trade know about the extent of our efforts in that direction, and had done everything within our power to convince them that we believed this plan to be for their interest as well as our own.

• • • •

Q. Were there any price moves that accompanied the elimination of the dealer service plan on March 16, 1931, Mr. Bowen? A. No. When we issued our quotations in March 16, 1931, we merely quoted destination prices 5 cents lower than we had quoted theretofore, but since we did not accompany those prices with the 5-cent dealer service payment the result was to give the dealer the same cost as he received before we had issued the quotations.

Q. You said you finally abandoned the plan altogether, Mr. Bowen. Did the elimination of this plan affect your prices to contractors? A. Yes. From the time the plan was eliminated, whenever we sold to contractors we sold them at the same price, at the same price we sold dealers.

Q. All right.

Now, leaving that period and going on: In March, 1931, after you abandoned all forms of this dealer protection you have been telling us about, did your company adopt any policy of determining the kinds of work you would sell direct and the kinds of work you would sell through a dealer? A. No, we merely followed the lines of our letter of March 16, 1931; sold through dealers when competition permitted and sold direct to contractors when we found in certain cases that our competition was on a direct basis.

Q. What happened with respect to your competitors as to that? Do you know whether or not any statement of policy regarding the kinds of work which were sold direct were issued by any of your competitors at that time? A. Yes. At about that time a good many of our competitors had issued statements in policy which included provisions for selling direct on certain classes of work.

Q. Do I understand that the Lehigh did not issue any such policy? A. We did not.

Q. Why, Mr. Bowen? A. We felt that our competitors' statements of policy were decidedly evasive and full of loopholes, and we thought that it was better strategy for us to issue the kind of statement we did which, in effect, said to the dealer: 'We don't think that these competitive statements of policy amount to anything. As far as we are concerned all we can say to you is that we will work with you and protect you to whatever extent our competition permits.'

We thought it was good strategy to issue such a statement, and it proved it was, it worked out that way, rather than issuing a statement, as some of our competitors did.'"[16]

Coogan, Vice President of Alpha, in response to a question as to what lead that company to begin to sell consumers at a higher price than dealers, testified:

[16] (R) Tr. 26723-27.

"A. Well, we had had at different times and from time to time some spasmodic efforts to establish dealer recognition. There were different methods at different times that were used but by 1915 that was the time we recognized the dealer trade and the time that we came in for dealer recognition, and I think that our company was the first. I cannot say that positively, but I think they were the first that came out with the announcement that they would recognize the dealer as quoting him one price and quoting a five cent higher price in quoting the consumer trade.

At one time in the interim, there was an effort on our part to classify our business by the size of the jobs. For example, a job over one size, or all jobs under a certain size we treated as one group and we tried to quote through the dealers. Then, we found that did not work because pretty soon every job was at least that large. So, we continued the trial and error method up until 1915, and we decided that a flat dealer's differential was the best thing for us, and was the best way for us to carry on our business.

Q. Do you know whether or not your competitors began to use the same policy at that time? A. Well, at that time the method which was made by us was popular with the dealers and I should hate to be the company that did not follow that plan, because it was acceptable to the dealers and they were the backbone of the manufacturer's business.

Q. Did you intend to convey by your answer that your competitors did or did not? A. Generally speaking, so far as I know, they did that, yes."[17]

Quotation sheets of Alpha issued in 1909-10 contain a provision assuring a 5¢ differential to dealers on all cement resold by them.[18] A memorandum by Coogan to the Sales Department dated March 10, 1916 states prices to be quoted and directs that in quoting the consumer trade in

[17] (R) Tr. 23559-60.

[18] Resp. Exs. 439, 442.

Georgia and Florida the price should be 10¢ per barrel higher and in North and South Carolina 5¢ per barrel higher.[19] Another memorandum by Coogan on the same day to his sales department and all salesmen, after setting forth a list of prices, states:

> "I understand the western mills are quoting the consuming trade 10¢ per bbl. higher than the prices quoted above. So far as I can understand, this differential of 10¢ applies in Pennsylvania west of the eastern boundary line of the following counties:—Erie, Crawford, Venango, Clarion, Armstrong, Westmoreland and Fayette.
>
> Salesmen will please not quote the consuming trade in the section of Pennsylvania, Ohio, Ind., Ill., Mich., or Kentucky without first taking it up with this office.
>
> The 5¢ differential between the dealer and consumer remains in effect the same as heretofore in New York State, Virginia, West Virginia and all other eastern territory."[20]

In January 1915 the general sales manager of the Ideal group writing to the sales manager of Three Forks set forth certain prices to be quoted and said:

> "You understand that the above prices are dealers' prices, and where positively necessary to quote to others than dealers, add not less than five cents per bbl. to the above prices, and as much more as you can get by way of protecting your dealers, and in that way they will stick closer to you."[21]

In 1918 in a carefully prepared printed instructions to salesmen Edison, speaking of its dealer differential, stated:

> "The Edison Portland Cement Company realizes the important value of the services rendered by the

[19] Resp. Ex. 671.

[20] Resp. Ex. 672.

[21] Com. Ex. 3209 A.

dealer in the distribution of its product. Without his assistance and the facilities which he possesses, we would be forced to maintain a large and expensive series of sales offices and warehouses, which would naturally increase the cost of our product to the consumer.

Fully recognizing this service, which is made possibe by a certain investment in warehouse properties and equipment, we believe the dealers' interests should be fostered and protected as in other lines of business. Therefore, in offering quotations to other than dealers, we will carry a minimum differential, in favor of the dealer, of ten cents per barrel.

It is clearly to our own interest to induce dealers to so handle their cement business as to net them a fair margin of profit. Help dealers to inform themselves on the cost of doing business, a result of which will be to discourage them from selling cement for carload delivery on a smaller margin than ten cents per barrel."[22]

In connection with the Cement Case,[23] a survey was made concerning the use of a dealer differential.[24] This survey showed that most companies had a 5 cent dealer differential up until 1916.[25] One company did not have any

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[22] Resp. Ex. 2567 D.

[23] *Cement Manufacturers' Protective Assn.* v. *United States*, 268 U. S. 588.

[24] Resp. Ex. 3788: Answer #29.

[25] Id. *The following companies had no differential:*

Company	Date
Vulcanite	before 1910 to 2/29/15
Edison	(Spring 1916 to 5/31/20 (6/26/21 to 1/1/22

Pennsylvania never had a uniform practice; it varied from 5c. to 25c.

prior to February 1915, and Lehigh varied the amount of cement on which the differential was applicable.[26] After

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The following companies had a 5c. differential:

Company	Date
Atlas (trade discount)	1909 and 1910
Penn-Allen	before 1910 to 12/16/16
Allentown	before 1910 to 12/11/16
Bath P.C.	before 1910 to 12/ 8/16
Coplay	before 1910 to middle of 1916
Atlas	1910 to 3/16
Lawrence	1910 to 12/11/16
Knickerbocker	1911 to 1/17
Security Cement & Lime	1913 to 3/16
Nazareth	1/27/13 to 12/ 6/16
Lehigh (on jobs not req. more than 7500 bbls.)	1/29/13 to 12/26/13
Giant	5/ 1/13 to 12/ 6/16
Lehigh (on jobs req. up to 15,000 bbls.)	12/27/13 to latter part 1914
Glens Falls	Fall of 1914 to 12/31/16
Dexter	Beginning of 1915 to 5/11/16
Lehigh (on jobs less than 3000 bbls.)	1/28/15 to 2/22/15
Lehigh (on all work)	2/23/15 to 12/ 5/16
Alpha	2/24/15 to 12/ 7/16
Vulcanite	3/ 1/15 to 12/ 8/16

[26] Resp. Ex. 3788: Answer #29. Lehigh differential. See also Com. Ex. 971-33 L-34 o.

Prior to 1913 no differential.

1/29/13 to 12/26/13—5c. on jobs less than 7500 bbls.

12/27/13 to end of 1914—5c. on jobs less than 15,000 bbls.

End of 1914 to 1/27/15—no differential.

1/28/15 to 2/22/15—5c. on jobs less than 3,000 bbls.

2/23/15 to 12/5/16—5c. on all jobs.

1916, practically all companies had a 10 cent differential.[27] This lasted until the end of the survey in 1922, although one company discontinued all differentials in June, 1921.[28]

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[27] Resp. Ex. 3788: Answer #29. *The following companies had a 10c. differential:*

Company	Date
Atlas (in certain territories only)	3/16/ to 12/ 6/16
Security Cement & Lime	3/16/ to 1/ 1/22
Dexter	5/12/16 to 5/18/16
Coplay	Middle of 1916 to 1/1/22
Lehigh	12/ 6/16 to 1/ 1/22
Nazareth	12/ 6/16 to 1/ 1/22
Giant	12/ 7/16 to 1/ 1/22
Atlas (in all territories)	12/ 7/16 to 1/ 1/22
Dexter (usually given)	12/ 8/16 to 1/ 1/22
Alpha	12/ 8/16 to 1/ 1/22
Bath P.C. (In 1920 a few 20c. differentials)	12/ 9/16 to 1/ 1/22
Vulcanite	12/ 9/16 to 1/ 1/22
Lawrence	12/12/16 to 1/ 1/22
Allentown	12/12/16 to 1/ 1/22
Penn-Allen	12/17/16 to 1/ 1/22
Hercules	1917 to 1/1/22
Phoenix (when it began selling direct)	1/17 to 1/ 1/22
Knickerbocker (10c. usually though some variations)	1/17 to 1/ 1/22
Glens Falls	1/ 1/17 to 1/ 1/22
Edison (10%)	6/ 1/20 to 6/25/21

Note: Dexter's policy varied from 5c. to 10c. from 5/19/16 to 12/7/16 at different times and in different places.

[28] Resp. Ex. 3788: Edison had no established differential 6/26/21 to 1/1/22.

Note: From spring 1916 to 5/31/20 Edison's differential varied from 2c. to 3c. to 25c. per bbl.

2. Dealer Discount

Coogan testified that the differential continued to 1926 and was then changed into a discount of 10¢ per barrel. The distinction, if any, he described as follows:

> "A. We quoted the dealer our price and if we quoted a consumer we quoted 10 cents a barrel higher than that price. Whereas, after the dealer discount came in we quoted them both the same price but extended to the dealer a dealer discount whereas we did not give the consumer a discount except in the case of purchases by public bodies."[1]

This change from a differential to a discount first appeared in an announcement published by Lehigh on August 17, 1926, and stated in part as follows:

> "Enclosed is a quotation on Lehigh cement, based on a new plan concerning which a few words of explanation may be in order. Effective immediately, we are quoting the same price level to both dealer and consumer, but with a ten cent per barrel dealer's discount to the dealer. This dealer's discount is separate and distinct from the usual cash discount.
>
> For some years past, cement has been generally sold on a basis of quoting the user 10¢ per barrel higher than the dealer. This was designed to protect the dealer to the extent of at least 10¢ per barrel on carload sales, a margin to which the dealer's service to the manufacturer, as well as to the construction industry as a whole, should rightfully entitle him.
>
> During the past year or two, this 10¢ per barrel differential plan has, in many markets, broken down to a serious degree. The causes leading up to this situation need not be analyzed here, but the facts must be faced. The dealer, deprived of incentive to actively push the sale of cement, finds his position seriously menaced. Nor does the contractor profit by this state of affairs. He, too, is at a dis-

[1] (R) Tr. 23563-64.

advantage, in constant apprehension lest his competitor have a more attractive price than himself in figuring a given job.

DEALER DISCOUNT PLAN.

There is urgent need for a plan which will ensure the user better market conditions and the dealer a living profit. We sincerely believe that this need is filled by quoting the same price basis to dealers and all others, with a 10¢ per barrel dealer's discount to the dealer. The plan gives opportunity to reestablish carload cement sales at 10¢ per barrel margin to the dealer, and we hope the trade will recognize the opportunity by preserving the dealer discount intact, so that its benefits may at all times be fully realized.'"[2]

Many companies followed Lehigh's plan.[3] Other com-

[2] Resp. Ex. 623 A; Bowen (R) Tr. 26701-05, *supra*, pp. 2440-43.

[3] A 10c. dealer discount was announced by various companies.

Company	Date of Announcement	Reference
Lehigh	8/17/26	Resp. Ex. 623 A
Missouri	8/17/26 (Approx.)	Com. Ex. 3117 L
Alpha	8/18/26	Resp. Ex. 655; (R) Tr. 23483, 23562-63
Universal	8/18/26	Resp. Exs. 2475, 2484
Edison	8/18/26	Resp. Ex. 2603
Medusa	8/25/26	Resp. Ex. 3158 A
Nazareth	In 1926	(R) Tr. 28208, 28461 (on 1/1/29–Com. Ex. 3127 D).
Lone Star (all)	In 1928	Com. Ex. 1112, Resp. Ex. 21
Southwestern (O)	on 1/28/28	Resp. Ex. 1698
Allentown	on 1/ 1/29	Com. Ex. 3149 D
Castalia	on 1/ 1/29	" " 3121 F
Diamond	on 1/ 1/29	" " 3139
Georgia	on 1/ 1/29	" " 3116 C
Giant	on 1/ 1/29	" " 3125 E

panies did not.[4] There is no evidence concerning other re-

Company	Date of Announcement	Reference
Glens Falls	on 1/ 1/29	" " 3147
Keystone	" "	" " 3146
Lone Star (Ala.)	" "	" " 3187 F
Lone Star (Ind.)	" "	" " 1112
Lone Star (N.Y.)	" "	" " 3184 D, 1112; Resp. Ex. 21
Lone Star (Pa.)	" "	Com. Ex. 3185 H
Lone Star (Va.)	" "	" " 3183 F
National	" "	" " 3115 C
N.W. States	" "	" " 3175
West Penn	" "	" " 3134 D
Nebraska	" 8/23/29	" " 2223 A
Missouri	11/25/30 (5c. trade disc.)	" " 3117 L

The following companies gave no indication as to when the 10c. dealer discount was started but they did employ it.

Ash Grove	Com. Ex. 2229 A, 2221 A
Colorado	" " 1273 G
Hercules	" " 3144
Kosmos	Resp. Ex. 2769
Monarch (for 6 mos.)	Com. Ex. 2229 A (R) Tr. 42309-10
Peerless	Resp. Ex. 2449 B
Standard	Com. Ex. 3169
Volunteer (1/3/31, 2/6/31)	Com. Ex. 1077 H, L, N, O
Vulcanite	Resp. Ex. 661
Southwestern (El Paso) for New Mexico & Texas	Com. Ex. 1273 G, L

Note: Texas companies probably followed this plan. Com. Ex. 1273 E, F.

[4] As of 10/17/28 *no company marketing* in Arizona had a trade discount (Southwestern, Monolith, California, Riverside, Santa Cruz) Com. Ex. 1273 G, L. Consumers were quoted 25c. up.

The following companies never employed it:

South Dakota (R) Tr. 41520-21

spondents.[5]

The dealer discount met with approval from the dealers. Denniston, President of the National Builders' Supply Assocation issued a letter on August 31, 1926 to all building supply dealers of the United States, in which, after referring to the plan, he said:

> "Every dealer knows from sad personal experience the evils that have existed in the marketing of cement during the past few years. The dealer's margin has been practically wiped out, competition has been ruinous, and a general state of chaos and uncertainty has existed. The user has been affected just as much as the dealer, for every contractor, even though he might have a price through some dealer on a split of the 10¢ per barrel differential, has been in constant fear that his competitor might have a still lower figure.
>
> Under the new dealer discount plan, there is a real opportunity to wipe out the old evils and to place the sale of Portland Cement on a basis where the contractor will have the assurance that he is not suffering from price discrimination, where the dealer

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[5] There is no evidence on this subject concerning:

Aetna
Arkansas
Consolidated
Coplay
Cumberland
Federal (not then a selling company)
Florida
Great Lakes (not a selling company)
Green Bag of W. Va.
" " " Pa.
Hawkeye
Idaho
Lawrence
Marquette
Monolith Midwest
North American
Oklahoma
Penn-Dixie
Petoskey
Pittsburgh Plate Glass
Utah
Signal Mountain
Southern States
Southwestern
Superior
Three Forks
Trinity
Union
Valley Forge (not a selling company)
Wabash
Whitehall
Wolverine

will have opportunity to render a real service at a living profit, and where the entire construction industry will benefit from sane, business-like and economic selling methods.

Whether this plan succeeds or fails rests principally with the dealer himself. To have it succeed we must resolve to stand behind the program in every particular and absolutely maintain the dealer's discount as the minimum profit to which the dealer is reasonably entitled. If the plan fails the former conditions of uncertainty and chaos will surely return."[6]

The dealers failed to support the discount by surrendering parts of it in gradually increasing amounts in order to get business. As a result the manufacturers found that the discount was not achieving its purpose. In August, 1929, Lone Star dropped its trade discount of 10% to dealers, but re-established it in September.[7] Concerning the failure of the dealers to support the discount, the National Builders' Supply Association of America circularized its members on October 14, 1929 saying in part:

"It is of the utmost importance that every dealer handling building supplies recognize clearly the damage to the dealer's business in the cement trade through the practice, which has grown quite prevalent in some parts of the country, of dealers allowing themselves to be either persuaded or coerced by the cement manufacturers or contractors to cut the established 10 per barrel trade discount. In many instances dealers have permitted cement manufacturers to handle contract business direct with the contractor and either on the basis of an assigned contract or through some other means, using the dealers' name, for which a small amount is usually paid. Such practices are fundamentally unsound, and if continued will unquestionably result in the

[6] Resp. Ex. 626.
Com. Ex. 971-33 L-34 o.

[7] Com. Exs. 3184 D, 3183 F.

near future in the cement manufacturers selling direct to contractors on large jobs. If this should occur, it necessarily follows that the practice will spread rapidly and will ultimately result in ALL carload business, DOWN TO THE SINGLE CARLOAD, being sold direct by the manufacturer. A moment's consideration will convince any intelligent dealer that if the carload business in his market is sold direct by the manufacturer, that it will be impossible for company is again operating under a fixed sales policy that will not permit it to accept contract business unless the dealer receives the full 10¢ per barrel trade discount.

This company, together with a very few other manufacturers who adhere strictly to ethical policies, are automatically barred from participating in contract business in those communities where the objectionable practices mentioned above are being followed. Thus the cement manufacturers who are the best friends of the dealer are penalized because many of the latter participate in such practices with the unethical cement manufacturers whose selfish object is solely to obtain tonnage without regard for the dealers. THIS IS A DANGEROUS SITUATION. Our friends among the manufacturers cannot be expected to continue to take punishment through the loss of business without ACTING AGGRESSIVELY IN DEFENSE of their positions in the trade and this unquestionably means that unless the dealers recognize their responsibility in the matter and immediately put a stop to the practice referred to they are soon going to have to face the reality of direct selling of cement by cement manufacturers on all contract work. * * *"[8]

a. Lehigh's Dealer Service Payment Plan, November, 1930

This failure of support led finally to the announcement by Lehigh of the Dealer Service Payment Plan as heretofore explained by Bowen.[1]

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[8] Resp. Exs. 634 A-B, 630.

[1] Resp. Ex. 623; Bowen (R) Tr. 26713-17, 26723-27, *supra*, pp. 2443-47.

Reiter, examined as to the reason for the introduction of the Lehigh plan, testified:

> "A. The company who initiated that plan stated, I believe, that they were doing so because of the prevalence of widely varying dealer differentials, * * *.
>
> * * *
>
> Q. As to the practice of the dealers at that time in cutting, that is what I understand, they cut their differentials in the form of a market price, didn't they, to their customers? A. Yes, sir.
>
> Q. Did that have any unsettling effect upon the conditions in the sale to the dealers by the manufacturers? A. Yes, sir, Mr. Wooden, in this way:
>
> If a highway contractor, purchasing cement for his job, and his job might run through two or three country towns, in each of which were a dealer, and now apparently some of these dealers competed for the business by cutting the amount of their charge-up, and I would think the dealers stated that it was through the suggestion of cement salesmen at some time.
>
> Q. Salesmen for mills? A. Salesmen for the cement companies.
>
> Now, then, if the sales manager of one company did not allow or did not encourage its salesmen to, in turn, encourage the dealer to sell at an extremely small price, they would rarely sell such a highway contract.'"[1]

Alpha followed this Plan and in explanation of it, Coogan testified:

> "In actual practice, the dealer had been abusing that discount to such an extent that he was reselling cement or accepting cement orders at a quarter of a cent, and we were not able to meet the competition of some other company, as well as our own, because of this abuse.

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[1] (C) Tr. 4272-73.

In other words, it was very confusing to the industry.

I think, about this time, some other company put this plan into effect and we followed it soon after they had put it in.'"[3]

In brief, the Dealer Service Payment Plan provided a quotation at the same price to dealer, contractor, or other consumer, but provided a payment of 5¢ per barrel to the dealer by the manufacturer at the end of each calendar year. The Plan did not limit or interfere with the dealer's price. As an added incentive, Lehigh coupled its announcement of this Plan with a small decrease in price.[4] A number of companies promptly followed Lehigh.[5] Other com-

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[3] (R) Tr. 23415.

[4] Resp. Ex. 630: Lehigh Dealer Service Plan dated 11/10/30. Bowen, Vice President, Lehigh (R) Tr. 26716-17.

[5]

Alpha	11/12/30	Resp. Exs. 632, 633
Giant	11/13/30	Com. Ex. 3125 E
	11/14/30	Resp. Ex. 639
Medusa	11/13/30	Resp. Ex. 3158 A
Universal Atlas	11/13/30	Resp. Exs. 635, 2484
Allentown	11/14/30	Com. Ex. 3149 D
Edison	11/14/30	Resp. Ex. 2603
Nazareth	11/15/30	Com. Ex. 3127 D (R) Tr. 28208-09
Bessemer	11/17/30	Resp. Ex. 651
Glens Falls	11/19/30	Com. Ex. 3147
		Resp. Ex. 632
Coplay	11/20/30	Resp. Ex. 642
Keystone	11/20/30	Com. Ex. 3146
Hercules	11/24/30	Com. Ex. 3144
	11/24/30	Resp. Ex. 643

panies made announcements dropping the 10 cent discount but did not embrace the Dealer Service Plan. Some com-

Missouri	11/25/30	Com. Ex. 3117 L
Georgia	11/28/30	Com. Ex. 3116 C
National	11/28/30	Resp. Ex. 3022 Com. Ex. 3115 C
Southwestern adopted it around	12/ 1/30	Resp. Ex. 1698
abandoned it in	1/28/31	
Diamond	12/ 4/30	Com. Ex. 3139
Castalia	12/19/30	Com. Ex. 3121 F
Hermitage	12/29/30	Resp. Ex. 644
Huron	1/ 1/31	Resp. Ex. 645
Volunteer continued in 1931	(1/15, 2/26)	Com. Ex. 1077 J-K, N-O
Kosmos (about)	2/ 2/31	Resp. Ex. 2769 (R) Tr. 36973
Lone Star (Ala.)	3/16/31	Com. Exs. 3187 G, 1125
Lone Star (Kan.)	4/ 4/31	Com. Ex. 1125
Lone Star (N.Y.)	3/17/31	Com. Exs. 3184 D, 1125
Lone Star (Pa.)	3/17/31	Com. Exs. 3185 H, 1125 Resp. Ex. 670 A-B
Lone Star (Va.)	3/20/31	Com. Exs. 3183 F, 1125
Northwestern States	2/ 3/31	Com. Ex. 3175 C
Peerless	1/29/31	Resp. Ex. 2448 B-C
Standard	3/21/31	Com. Ex. 3169 C
Vulcanite	2/14/31	Resp. Ex. 661
West Penn	3/ 3/31	Com. Ex. 3134 D

panies never adopted the Dealer Service Plan.[7] There is no evidence on this point about a number of companies.[8]

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[7] Ash Grove: Never followed it (R) Tr. 42061-64; Com. Ex. 2239.
Dewey: Never followed it (R) Tr. 47065; Resp. Ex. 3640 G, I, M.
Green Bag of West Virginia: Never followed it (R) Tr. 29532.
Hawkeye: Never followed it (R) Tr. 41797.
Lone Star: Never followed it (R) Tr. 34739 (C) Tr. 6490, 4282; Resp. Exs. 646, 647, 648, 487; Com. Ex. 1131 J.
Marquette: Never followed it (R) Tr. 39040, 39989; Resp. Ex. 2991.
Monarch: Never followed it (R) Tr. 42310-11.
Nebraska: Never followed it (R) Tr. 42061.
South Dakota: Never followed it (R) Tr. 41520-21.
West Penn: Never followed it, Com. Ex. 3134 D.
Whitehall: Never followed it (R) Tr. 28576-77; Com. Ex. 1131 J.

[8] *Pacific Coast companies:*

Beaver
Calaveras
California
Monolith
Northwestern Portland
Oregon
Pacific
Riverside
Santa Cruz
Southwestern (Los Angeles)
Spokane
Superior Portland
Yosemite

Other companies:

Arkansas
Colorado
Cumberland
Federal (not a selling company at this time)
Florida
Great Lakes (not a selling company)
Green Bag of Pennsylvania
Idaho
Monolith Midwest
Oklahoma
Peerless
Utah
Signal Mt.
Southern States
Standard
Superior
Three Forks
Trinity
Union
Valley Forge (not a selling company)
Volunteer
Wabash
Wolverine

The Plan did not meet with success. Many complaints were received by Lehigh and other manufacturers from dealers and dealer associations.[9]

Fain, a representative of Lone Star, reporting to its New Orleans Office on December 9, 1930, about a meeting of dealers held in Monroe, La., on December 6, to discuss the Plan, said:

> "• • • for the most part, I believe the dealers were very much against the idea."

And he went on to say:

> "I felt that it was my duty to call the dealers' attention to the fact that they had started out to get twenty-five cents per barrel on cement, and they were endorsing a policy that only assured them of five cents. I also asked permission to ask them one question before the committee was appointed to form the resolution. My question was—if they were trying to get twenty-five cents per barrel, would they rather start with the assurance of five cents at the end of the year, or the assurance of ten cents per barrel, deductible from the face of their invoice, as offered by our Company? I also called their attention to the fact that the Lehigh Company was promising them something that the LONE STAR Company had always done—to uphold the dealer's price or quotation—no matter what it might be, even to the point of turning down business, and that the Lehigh Company was promising them not to quote direct to the trade, while in their new policy circular, they reserve the right to not only quote, but sell direct to the contractor if they deemed it advisable."[10]

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[9] Resp. Ex. 3640 A, K, L, H; Resp. Ex. 2670; Resp. Ex. 1477 A-C; Resp. Ex. 2672 B-C; Resp. Ex. 1479; Resp. Ex. 1480 A-C; Resp. Ex. 1482; Resp. Ex. 1483.
Coogan, Vice President, Alpha (R) Tr. 24713-14, 23502-03.
Bowen, Vice President, Lehigh (R) Tr. 26717.
McGovern, Sales Manager, Hermitage (R) Tr. 36200.

[10] Com. Ex. 1131 G, H.

During the experiment with the Lehigh Dealers Service Plan a number of manufacturers met in Washington at the invitation of Secretary of Commerce Lamont in December, 1930. Hogan, then Vice President of International [Lone Star], was present at this meeting and reported upon it in a letter to Struckmann, then President of International [Lone Star]. The purpose of the meeting with Mr. Lamont does not clearly appear and nothing came of it. After the meeting most of the manufacturers lunched together. Hogan left early to catch a train but he later had reports of the meeting. His letter to Struckmann says:

[Italicized part quoted in Fdgs. Par. Fourteen (e)]

"The matter of differences in sales policy still continues to occupy the center of the stage, so far as the cement industry is concerned.

The Lehigh Company and some of those who have joined with them have been making very strenuous efforts to bring all the members of the industry to the Lehigh selling plan. They have been successful to a marked degree, for as stated in a previous letter, the only companies in the East who have not announced that they were going to follow the plan are Whitehall and ourselves. In the Middle West Wabash, Standard Portland Cement at Painesville, Ohio, Marquette and our company are the exceptions, although Missouri Portland has also put in a modified plan which recognizes the 5¢ differential but allows deduction when the invoice is paid. They have not been so successful in the Kansas field for there all of the companies are following the old plan, with the exception of Atlas, Lehigh and Alpha."[11]

Hogan then referred to the reports he had of the meeting after he left it and continued:

"The reports I have received would indicate that there was quite an interesting session in which Mr. Sunderland took occasion, in a very able talk, to criticize the Lehigh plan and the method by which

[11] Com. Ex. 1131 J.

it was inaugurated. The outcome of the meeting was that a committee was appointed with Frank Smith as Chairman and to include Blaine Smith, Sunderland, Norcross, Col. Young, Brown and me. The duty of this committee was to try to conciliate the difference existing within the industry and try to arrive at some basis on which the industry could progress."[12]

Hogan went on to state that after discussion of this proposal with Bissell, another officer of Lone Star, he declined membership on the committee and Frank Smith expressed the opinion to him that if Lone Star would not be represented the committee would probably not meet.[13] No action appears to have been taken by this committee and neither manufacturers nor dealers were consulted.[14]

On January 10, 1931, Condon, the General Manager of Hawkeye wrote to Rader, Vice President of Lehigh, criticizing the inadequacy of the presentation of this plan to the dealers, as follows:

"Have been thinking a good deal about your new marketing plan, and the opposition to it in certain quarters.

It is clear that eventually, we must all go along on the same plan, whatever it is. In talking with quite a few dealers, I find their antagonism to the plan lies principally in the fact that they are fearful of indiscriminate direct quotations to anyone who

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[12] Com. Ex. 1131 K.
Sunderland was President of Ash Grove, Frank Smith, President of Lawrence, Blaine Smith, President of Penn-Dixie, Young, President of Lehigh, Brown, President of Alpha at the time of this conference.

[13] Com. Ex. 1131 K.

[14] Alpha: Coogan, Vice President (R) Tr. 24704-05.
Dewey: Moore, R. W., Vice President (R) Tr. 47066.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6517.
Whitehall: Elliott, Vice President (R) Tr. 28577.

may want to buy cement in either large or small quantities.

It seems to me that if it is the intention of your Company, as well as others who have adopted this plan, to make absolutely no change in your policy with regard to dealer distribution, that that point should be more clearly and emphatically set out by you in a special circular bearing on that one point. It will take a long time for your salesmen to educate the dealers by word of mouth, to the fact that you do not contemplate any change in your policy of selling through dealers, and do not intend to quote direct and indiscriminately to anyone having cement to buy.

In talking with Mr. Brown in Kansas City, he assured me that this was exactly what your plan contemplates, but if it is, I don't think your circulars nor those of the other Companies following the plan, are sufficiently clear on that point. Furthermore, I think if this point could be definitely cleared up, it would have a salutary effect on the attitude of Companies who have not adopted the plan, and who apparently have absolutely no intention of adopting it.

Am greatly concerned over the situation, as it exists today, and it seems to me that if you can take the step that I suggest, it might be the entering wedge in the reaching of a common understanding all around. Perhaps I do not correctly understand your real attitude on this point, and what I suggest may be entirely out of order, but at any rate, I am giving it to you for what it may be worth."[15]

By the end of January many companies, who had adopted the Plan, had announced its discontinuance, and others followed.[16]

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[15] Com. Ex. 2227.

[16] *Dealer Service Plan Abandoned*

Company	Date	Reference
Diamond	12/29/30	Com. Ex. 3139 D
Bessemer	1/14/31	Resp. Ex. 651
Univ. Atlas	1/23/31	Resp. Exs. 652, 2478, 2484, 3640 U-V

There was no agreement among manufacturers, dealers, or associations, to adopt, continue or discontinue the Dealer Service Plan.[17]

Alpha adopted the Plan but on January 31, 1931 announced that instead of holding the 5¢ payment to the end of the calendar year, it would credit the 5¢ upon the payment of the invoice.[18]

Company	Date	Reference
Giant	1/24/31	Resp. Ex. 639
Hercules	1/24/31	Resp. Ex. 643
Medusa	1/24/31	Resp. Exs. 653, 3158 A, D
Allentown	1/25/31	Com. Ex. 3149 D
Coplay	1/26/31	Resp. Ex. 656
Edison	1/26/31	Resp. Exs. 655, 2603
Lawrence	1/26/31	Resp. Ex. 640
Nazareth	1/26/31	Resp. Ex. 657; (R) Tr. 28220-23
	Notes:	Com. Ex. 3127 D shows 1/23/31.
North American	1/26/31	Resp. Ex. 654
Petoskey	1/26/31	Resp. Ex. 2952
Georgia	1/27/31	Com. Ex. 3116 C
Penn-Dixie	1/27/31	Resp. Exs. 684, 638, 660
Southwestern (O)	1/28/31	Resp. Ex. 1698
National Cement	1/28/31	Resp. Exs. 3032, 3035
Hermitage about	1/29/31	(R) Tr. 36199
Huron	2/ 2/31	Resp. Ex. 658
Missouri	2/ 2/31	Resp. Ex. 659
Vulcanite	2/14/31	Resp. Ex. 661
Glens Falls	3/ 2/31	Resp. Ex. 663
Pittsburgh	3/ 2/31	Resp. Ex. 662
Lehigh	3/16/31	Resp. Ex. 669; Com. Ex. 1194 A-B; (R) Tr. 26726
Alpha	4/ 1/31	Resp. Ex. 650

[17] Coogan, Vice President, Alpha (R) Tr. 24704.
Robeson, Vice President, Nazareth (R) Tr. 28247.

[18] Resp. Ex. 649, 3640 Z 9-10.
Coogan, *supra*, Tr. 23490-91, 23533, 23536.

On February 2nd,[19] February 11,[20] and February 28, [21] 1931, Lehigh issued announcements to the trade in an attempt to secure the dealers' adherence to the Plan. On March 16, 1931, Lehigh abandoned the Plan and quoted the dealer and consumer at the same price.[22]

In announcing to dealers its abandonment of the plan, Lehigh made this significant statement:

> "Unfortunately, competitive conditions within the cement industry are unchanged. Our successive steps to preserve dealer protection were met by competitive quotations without any form of general dealer protection. No one manufacturer standing alone can continue permanently a position which a large majority of the industry does not support."

It then set forth its position as follows:

> "Our position is—we will, to the utmost extent that competitive conditions permit, work with and for the established dealer, respect and support his resale prices and cooperate in his effort to maintain stable conditions in his market."[23]

Alpha, the last company to announce abandonment of the plan, in a notice to its salesmen after reciting competitive conditions, said:

> "Under these circumstances, we are forced to the conclusion that we cannot materially assist our dealers by quoting a price higher than our competitors' and it is possible that a much needed stabilization of local markets will result through the use of uniform quotations throughout the industry.

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[19] Resp. Exs. 664, 665.

[20] Resp. Exs. 666, 667.

[21] Resp. Ex. 668.

[22] Resp. Ex. 669.

[23] Id.

> Actually, then, our present position is this: The resale price of our product is entirely in the hands of our dealers. You will at all times work with and for your dealer, quoting only such prices as he may indicate to you."[24]

Young, the President of Lehigh, writing to Dr. Burns on June 29, 1935, in answer to inquiries concerning the Plan, described the reasons for instituting it, the virtues claimed for it, and the failure to appreciate it which compelled its abandonment, in the following terms:

> "Prior to the adoption of the plan the dealer was quoted the same price as the contractor but was allowed upon payment of invoice a trade or dealer discount of ten cents per barrel. The ten cents per barrel allowance was intended to compensate the dealer for services rendered in affecting the sale, assuming the credit risk, warehousing and handling the cement. During 1929 and 1930 marketing conditions in the cement industry became more and more chaotic. The dealer, instead of pocketing the ten cent allowance to cover his own risks and labors, used the discount as a scheme for chiseling the price. The ten cent differential soon became honored more in the breach than in the observance. The dealer in order to procure much desired business often passed on to the contractor as much as eight or nine cents of his ten cent per barrel price advantage. The contractor because of the ruinous competition among the dealers was usually able to procure within a few cents of the minimum price. The dealer received next to nothing for his services and such portion of the discount as was retained was insufficient in many cases to cover even out of pocket expense.
>
> The shaving of the ten cent differential forced many dealers to the wall not only because of inadequate compensation but also because of an entirely new type of competition. When it became apparent that many dealers were willing to accept less than

[24] Resp. Ex. 650.

ten cents per barrel as compensation for handling cement, certain manufacturers made a practice of procuring contracts by connivance. The manufacturer would contact the contractor to discover what, if any, price reduction was necessary to land the job. In the event that the contractor indicated that there was an opportunity to buy cement at less than the maximum delivered price, the manufacturer would approach a dealer and attempt to induce him to accept less than the full ten cent differential. As this practice grew, the weaker dealers became mere tools in the hands of certain manufacturers for chiseling the price to the contractor. The trade discount in many instances was completely ignored and in other cases where some compensation was afforded it was paid purely on a commission basis without regard to the number of barrels involved. Some manufacturers even went so far as to create dealers for the purpose of selling large contracts at the lowest possible dealer cost.

Because of the breaking down of the trade discount, the legitimate dealer found himself overpowered by two economic factors. In the first place there was no possibility for obtaining sufficient compensation to make a profit. Secondly such business as might fall within the dealer's province was being passed through agents who were classified overnight as dealers by those who were taking full advantage of the instability of the market. In order to give the legitimate dealer the protection he justly deserved and in order to bring some semblance of order out of chaos, the Lehigh Company formulated its Dealer Service Plan. Under the plan the dealer became entitled to the five cent service payment only in the event that he properly qualified as a dealer and actually performed the services of a dealer. In other words, the plan was devised to afford the legitimate dealer adequate protection and compensation and to eliminate the straw man and the fictitious dealer from the market.

Unfortunately the Lehigh Dealer Service Plan did not meet with unanimous acceptance on the part of the industry. Had the plan been adopted in the

area in which Lehigh Cement was marketed, no question of price reduction would ever have arisen. However, because certain of our competitors misconstrued the operation of the plan and interpreted the service payment at the end of the year as a reduction of five cents per barrel in the price, quotations were issued from time to time by competitors which reduced current prices by five cents a barrel to equalize what was thought to be a five cent per barrel advantage in the Lehigh Plan. When these reductions were made it was quite apparent that Lehigh Cement could not command a five cent premium in spite of the service payment at the end of the year. Therefore Lehigh was forced to promptly meet these several reductions regardless of how the delivered prices were arrived at or upon what mill they were based."[25]

At the time that the Lehigh plan was breaking down, Keller, Vice President of Pacific, wrote to Condon, General Manager of Hawkeye at Des Moines, Iowa, asking for general and specific information as to the plan of marketing cement in Dewey's territory. Condon answered:

"The Universal-Atlas, Alpha and Penn-Dixie Companies here all abandoned the Lehigh Company's plan, and are now either quoting direct, subject only to a cash discount, or 5 cents high, subject to a dealer's discount of that amount in addition to the cash discount, both deductible at time of payment.

The Marquette, Penn-Dixie and ourselves are quoting subject to cash discount only, no dealer's discount being involved.

The Ash Grove and Monarch Companies are quoting 10 cents higher than the rest of us, subject to a dealer's discount of 10 cents, and a cash discount of the same amount.

Practically all of the companies are consulting dealers to see what margins they want before making direct quotations to contractors.

[25] Com. Ex. 971-14 U-14 W.

The International Company will sell direct to contractors, carry the account and allow the dealer the commission he asks, and we are at present doing the same. In cases where cement is sold direct to the Government, there is no commission or allowance for dealers. In case of direct sales to Highway contractors, the dealers in Iowa have agreed to be satisfied with a commission allowance of 5 cents per barrel.

Dealers in Nebraska are similarly inclined, and in Minnesota the State buys the cement and furnishes it to the contractors. This is also the case in Illinois and Missouri.

Public utilities are treated just the same as any other consumers, although in the South and Southwest, hydro-electric plants buy cement on the same basis as dealers with no commission in it for the dealers, as I understand it.

In regard to readymix plants, some of them are considered dealers and buy at dealer's prices. Others are considered consumers and buy through the dealers. There is no uniformity of practice in this regard in the territory we serve.

You can see from the foregoing that the situation in the Middle West is decidedly lacking in uniform practice, but all I can do is to give you the facts as they exist."[26]

As the Lehigh's dealer's service plan broke down, Neylan, then Assistant General Sales Manager of Lone Star, wrote to the company's Kansas City office on April 4, 1931, concerning advice that all manufacturers in that territory, except Lone Star, were then quoting prices subject to the cash discount only, that is, without a trade discount to dealers. Neylan directed the Kansas City office "to place your company on the same basis as your competitors to the extent that all quotations issued be subject only to the cash discount."[27]

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[26] Com. Ex. 2229.

[27] Com. Ex. 1120 C.

b. Lehigh's "Twenty Years of Dealer Protection," May, 1931

In May, 1931, after the abandonment of the Lehigh Dealers Plan, the Lehigh Company published a 28-page pamphlet under the title "Twenty Years of Dealer Protection."[1] This is probably the most complete history of the effort of manufacturers to protect the markets of their dealers and the failure of their plans due to forces of competition at work between manufacturers and between dealers. The Findings quote at length from this exhibit and the evidence which it affords is of particular merit because of the time of the publication and the completeness of the discussion. The introduction states in part:

> "In the distribution of cement, the product of each mill is shipped into the markets of many dealers, and at least several manufacturers compete with one another for the business in each market. Therefore if unsettled conditions exist in a few markets, a number of dealers and manufacturers are affected. Unless checked, these conditions spread to other markets. Eventually a general state of demoralization results, from which dealer, contractor, and the manufacturer all suffer.
>
> An important factor to be considered is that jobs served by carload delivery have greatly increased in size and number in recent years. Often these jobs are located where the nearest dealer can render no specific service to the purchaser. In many cases the dealer is not equipped to handle or finance the sale. It is not uncommon for dealers to express themselves as not being interested in business of this character. In such cases the consumer finds it difficult to see wherein a policy of dealer protection is justified, and struggles against it.
>
> Thus the difficulty of maintaining any marketing structure where several groups—manufacturers, dealers, and contractors—are concerned, and where opinions differ even within each group, is obvious.

[1] Com. Ex. 971-33 L-34 o.

Yet the stability so essential to each group can be attained only through an orderly structure. Such a structure, to survive, must consider the interests of dealer, manufacturer, and contractor, and be fair to all. It must also take into consideration the many varied situations and conditions of jobs called for carload deliveries, and be related to the complete picture of all cement distribution.

The purpose of this book is to present briefly:

The development of dealer protection.

The part played by the Lehigh Company in that development.

The fundamental facts of cement marketing problems in the light of the experience of the past twenty years."[2]

Discussing the development of dealer protection and outlining the various methods tried, the pamphlet states:

"Competition among manufacturers for this tonnage was intensified, and as quotations for carloads were made at the same prices to dealers and consumers, it was impossible for dealers to participate to any extent in this class of business. Uncertainty and unsatisfactory marketing conditions existed everywhere. Dealer and manufacturer sought to bring about more stable conditions and a structure of dealer protection that would be fair to both.

The way was difficult, but the principle was finally established. Through the years, various methods of dealer protection were tried with more or less effectiveness. Until the present, the principle of dealer protection has been preserved, even though each plan put into operation broke down, to be followed by a new one. Now the principle itself is threatened, and once more, after nearly twenty years, dealers are faced with general direct selling.

* * *

[2] Com. Ex. 971-33 M.

Chronological Outline of Marketing Structures

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

Prior to 1913—Dealers generally were not protected in any way. In some sections attempts had been made to establish dealer protection in one form or another, but none succeeded.

January, 1913—On operations requiring less than 7500 barrels each, first efforts were made to quote only through dealers. On jobs requiring more than 7500 barrels, the minimum price was quoted to contractors.

December, 1913—The quantity per operation on which the dealer received protection was increased to 15,000 barrels.

Throughout 1914—No general protection was given to dealers on any quantity. However, late in 1914, in the Northeastern states, protection was once more given to dealers generally on jobs of less than 3000 barrels. The quantity was again successively increased to 7500 barrels and 15,000 barrels. In the central West dealers were protected to the extent of 5¢ per barrel regardless of quantity.

February, 1915—In all territories contractors were quoted 5¢ per barrel higher than dealers, regardless of quantity.

February, 1916—The differential was increased from 5¢ to 10¢ per barrel.

August, 1926—The Trade Discount method of quoting was advanced, making price to dealer and consumer the same, but with a 10¢ per barrel dealer discount to dealers on business handled by them.

November, 1930—The Service Payment Plan of dealer protection was created.

And, in 1931—The flat price method of quoting, without general dealer protection, returned.

Competition alone did not retard the development of these successive structures or break them

down. The fact that some concerned with the problem often failed to think in terms of an industry had its effect. Some sought an impossible structure which could not be generally maintained. Some contributed to breaking down each structure by seeking individual advantage, or endeavoring to meet another's supposed advantage.

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

The early efforts to establish the principle of dealer protection involved a consideration of many suggested methods. *Before 1913 the flat price method of quoting prevailed most generally—the same price being made to dealers and consumers. The difficulty with this method was that while some manufacturers did not sell carloads to consumers where they had dealer representation, others, without such representation, did quote and sell direct. With the rapid growth of carload business, this difficulty led to market conditions so disturbed that both dealer and manufacturer sought to develop methods that would correct these conditions and give both a stable basis of operations.*

At that time some of the larger dealers who also operated as jobbers had a distinct advantage over their local competitors who were dealers only. Competition led to price concessions to some of these other dealers who were faced with such situations. In those days the opinion was quite widely held that price distinctions based on the size of the buyer or his purchasing power, or the location or character of the work, should be made.

But distinctions of this sort proved to be impractical and demoralizing. *Price discriminations brought the invariable result of secret concessions, inside commissions, unequal and unfair dealing as between buyers in the same market and inevitable trade resentment and resistance.* More and more it was clear that any method of selling that would work must be one that would be open, fair to all concerned, and with equal sales opportunity to all.

Under the conditions then existing the most feasible plan that met the test of these needs appeared to be a general protection for the dealer on

all purchases under a given amount, and in 1913 an attempt was made to put such a structure into effect. The effort failed because support was not given by the entire industry. Throughout 1914 there was no dealer protection. Late that year, however, efforts were again made to revive interest in this subject * * *.[3]

* * *

This movement led to the establishment of the differential form of dealer protection. Out of it grew, step by step, the various marketing structures of succeeding years.

* * *

The procedure had been to have only dealers quote the contracts on which dealer protection was offered. But frequently a desirable contract arose in a market where there were only one or two dealers, with ten or a dozen cement producers trying to secure the business. Obviously the one or two dealers could not always handle the ten or twelve brands of cement. Hence, in such cases, many of the manufacturers were practically eliminated unless they sold direct, or unless they opened up new retail outlets, which was harmful to the established dealers. With such conditions existing, it was apparent that competition would force dealers' margins to a point where the business would be unattractive and that this would leak back to direct selling without dealer protection.

Out of these early efforts it became evident that a structure was needed to give general dealer protection without trying to differentiate between size or kind of projects or classes of markets. Only such a structure could hope to correct differences of interpretation and weaknesses generated by competition. Out of these considerations was evolved the theory of a general differential—that is: one price level to the dealer and another level to the contractor. Such a structure with a 5¢ differential for the dealer was tried in some territories. It brought favorable results and received a great deal of sup-

[3] Com. Ex. 971-33 N-O.

port as a method that provided equal opportunity to all dealers and manufacturers to sell and that supported the principle of general dealer protection.

Five Cent Differential Established

The movement for dealer protection by a five cent per barrel differential had gained headway rapidly, and in February, 1915, the Lehigh Portland Cement Company announced that it would quote contractors 5¢ per barrel above its price to dealers on all business and in all territories. This method developed into a general practice, thus establishing the first general structure of dealer protection.

The need was immediately apparent for acquainting all dealers with the merits of this marketing structure and the desirability of upholding it. The task fell upon the shoulders of the manufacturers and dealers who had worked on the problem. The dealers were handicapped because in many sections they were not organized, and such organizations as did exist were relatively weak in membership. Lehigh contributed its efforts in various ways, among them being to suggest that dealers organize, or join existing dealer organizations. * * *

These efforts soon bore fruit. Manufacturer, dealer, and consumer alike began to realize the benefits of greater stability. Destructive methods of selling had not yet developed, and the 'differential' by which name the protective margin was then known, was maintained practically everywhere.

In the meantime increased freight rates and rising costs of manufacture brought advancing prices, and efforts were directed to increase the dealer's margin proportionately. As a result, the differential was increased from 5¢ to 10¢ per barrel.

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

While the entire industry observed the 10¢ per barrel differential, disquieting happenings indicated that there would be difficulty in maintaining it.

In a desire to obtain attractive carload business, many dealers continued to sell on a 5¢ margin, and thus quoted the manufacturer's product to the con-

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

sumer at a lower price than the manufacturer himself would quote. The manufacturer who endeavored to uphold the 10¢ differential for dealers soon found himself at a disadvantage in actual selling—the business going to competitive brands on which split differentials were quoted.

Dealers who tried to uphold the 10¢ differential found that competition forced them to sell for less. The contractor naturally shopped for the lowest price. The cement salesman, in his desire for tonnage, often sought the dealer who would accept the smallest margin. These conditions spread from market to market, finally creating a grave general situation."[4]

After referring to governmental restrictions imposed during World War I and the freight car shortage which followed, resulting in a boom period, the pamphlet continues:

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

"The Practice of selling through cut dealer differentials again became so general that a complete breakdown of the structure of dealer protection was impending. Manufacturers, dealer associations and prominent individual dealers again renewed their activities to correct the evils, and there was an urgent call for a new marketing structure.

DEALER TRADE DISCOUNT

To correct the evils, and bring about methods and practices that would again stabilize conditions, the Lehigh Portland Cement Company developed the Trade Discount Plan and advanced this idea to the trade. It was another effort to preserve the principle of dealer protection and to establish a new plan to maintain this principle. This method of selling quickly became a general industry practice.

Under this plan the dealer who made a sale and performed the normal dealer functions received the ten cents per barrel trade discount from the manu-

[4] Com. Ex. 971-33 Q-W.

facturer. Where there was no dealer, or where a manufacturer had no dealer connection and sold carloads direct, he did not give the Trade Discount to the consumer. This preserved the principle of dealer protection, for the dealer could sell carloads at the manufacturer's price and receive ten cents per barrel margin in the Trade Discount. At the same time it assured the manufacturer an equal opportunity to sell in markets where the dealer did not or would not handle this product.

It was evident that if this method was to succeed in curing the evils it needed the whole-hearted support of dealer and manufacturer, and that it would have to justify itself in the consumer's eyes by accomplishing stability.

On August 17, 1926, Lehigh announced the Trade Discount Plan. * * * In it, the purposes of the plan were outlined and the results it was hoped would be accomplished if generally supported. Dealers who had been working for a solution of the problem readily saw the need for support and various dealer associations were quick to get behind the Plan.

As an example of the attitude of the Associations there is shown on page 13 an open letter from the President of the National Builders' Supply Association urging dealers everywhere to stand behind the Trade Discount and give their whole-hearted support to this method of preserving the principle of dealer protection.'"

Describing the disintegration of the trade discount, the pamphlet says:

"For a time it appeared that the new plan would succeed. Finally, however, in spite of the fact that the Trade Discount was staunchly upheld by many dealers and manufacturers, the processes of disintegration again prevailed. Quotations were made where part of the Trade Discount was passed to the consumer, and again the manufacturer's brand was quoted through some dealers at less than the manufacturer's own price to the consumer. The contrac-

[4] Cont. Ex. 971-33 W.

tor naturally sought to buy through such channels because he could obtain better prices that way than he could secure either from dealers who upheld the Trade Discount or direct from manufacturers. The salesman again sought the dealer who would split the discount, and the old evils returned.'

In many sections of the country these practices developed to such an extent that they were becoming an accepted method of doing business. Many did not realize the effect on the situation in general, nor how they contributed to the steady disintegration of the Trade Discount.

Other insidious methods were also employed. As some were possibly not so well known in all parts of the country, attention is directed to them below.

[Italicized part quoted in Fdgs. Par. Seventeen (c)]

Cutting the Trade Discount by competition between dealers in their own markets. Often this was done to sell other materials.

Shipping for the account of a dealer to markets other than his own. By this practice the manufacturer, using for the purpose a dealer who would cut his differential, sold carload tonnage over a wide territory at less than the manufacturer's own price to the consumer.

The subterfuge dealer, created by the manufacturer to secure attractive business at split discounts.

The 'assigned contract', where the dealer—real or subterfuge—received a small commission for the use of his name, enabling the manufacturer to sell direct and pass the Trade Discount on to the consumer, while still claiming a policy of dealer protection.

The 'assigned' contract came into extensive use under the Trade Discount Plan. The exhibits herein, which need no further comment, indicate that it was considered a most insidious and destructive practice. It brought with it a promiscuous use of the subterfuge dealer where an established dealer would not allow business to be handled through him on this basis.[6]

[6] Com. Ex. 971-34 B.

> Despite continued efforts, destructive practices developed at an alarming rate. The Trade Discount Plan had become the football of competition among manufacturers and dealers. Both realized that complete demoralization was imminent, with the principle of dealer protection hanging in the balance. The acuteness of the situation was discussed everywhere.'"[7]

The pamphlet then proceeds to reproduce an account of the dealer service payment plan as originally announced and set forth in Resp. Ex. 630 C. Then in its conclusion the pamphlet stated:

> "Our conviction is that any plan of distribution that strives to embody the principle of dealer protection must be based on these fundamentals:
>
> 1. A marketing structure which affords general dealer protection.
> 2. A responsibility on the manufacturer to regard and preserve the structure—not break it down;
> 3. An obligation on the dealer to preserve the structure and to perform all the functions of a dealer.'"[8]

Following the abandonment of dealer's differentials, dealer's discounts and the Lehigh plan, the practice which prevailed was to quote all buyers at the same price protecting the dealer by reserving certain fields for his trade as heretofore described.[9] However, where a dealer was known to be bidding to a contractor and the contractor was also asking for bids from manufacturers, the manufacturer's bid was advanced over the dealer's price by the prevailing markup which the dealers were charging in the

[7] Com. Ex. 971-34 G.

[8] Com. Ex. 971-34 I.

[9] *Supra*, pp. 2285-96.

territory where the sale was to be effected or by a specific amount requested by the manufacturer's dealer at the point of destination.

When the cement NRA Code was in preparation, Chaffee, President of the New York State Building Supply Association, and others wrote to the Institute asking that the Cement Code provide a dealer's differential.[10] However, the matter was disposed of by Article XI of the Code which was so promptly suspended by the NRA at the request of the dealers.[11]

3. Protecting Dealer Mark-up

The price at which the dealer sold above his cost of purchase is referred to in the evidence both as a mark-up and a differential. As to what this amounted to following the breakdown of dealer differentials or discounts given by the manufacturers, Reiter testified:

> "Q. But so far as the prevailing differential between the dealer's cost in buying and his price in selling, did that center around the 10-cent differential as previously? A. Well, I think it was about the same as it was previously until the time of the dealers' code and the so-called Modal mark-up.
>
> Q. Under the dealers' code, was the dealer's differential changed, and if so, to what? A. Under this Modal mark-up which received the approval of the NRA, their carload differential on cement—that is, on standard cement—was set at 15 cents per barrel.
>
> Q. And as I understand it, prior to that time, it had been considered as 10 cents? A. No, Mr. Wooden; I have tried to explain that. There may be places where they got 25 cents and as low as 2 cents, but I would say that 10 cents was possibly the prevailing mark-up.

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[10] Com. Ex. 834 E.

[11] *Supra*, p. 2298 *et seq.*

Q. A sort of standard that was not always adhered to? A. That is right.

Q. Sometimes more and sometimes less? A. That is right.[1]

• • •

A. I would like to make it plain, if it is not already plain, that in talking about dealers' mark-up, or the difference between the sale of cement in carloads by the dealer, and the price which the dealer pays the manufacturer, that I was speaking from a knowledge of what the dealers sold cement for, and that that differential in all cases was set by the dealers themselves, or by the Modal mark-up, which was a feature of the dealers' Code during NRA days.

Q. Was there at any time a suggested amount of mark-up suggested to the manufacturers.[2]

• • •

A. I don't know of any."[3]

Bowen was examined as to the procedure followed by Lehigh when it quoted what a dealer was quoting on the same job and if it did so, and he testified:

"Q. Has it been customary for the Lehigh Company to quote at times on the same business that dealers quote on? A. Yes, it has.

Q. Hasn't it been customary for the Lehigh Company to quote in such cases the same price as the dealers quote? A. To the Government, yes.

Q. And didn't the ending of your dealer distribution plan, and the 5 cents deferred compensation, when that ended, didn't the 10-cent margin come into existence? A. No, when that ended—when we quote direct we quoted ordinarily at the same price as we quoted a dealer.

Q. The dealer quoted 10 cents up, why, you quoted 10 cents up; is that right? A. To a contractor; if a

[1] (C) Tr. 4275.

[2] (C) Tr. 4280.

[3] (C) Tr. 4282.

dealer quoted any price above his cost, we ordinarily did not quote to the contractor direct unless we found competitors doing so.

Q. And when you quoted a contractor direct, didn't you quote 10 cents up, if the dealer there were quoting 10 cents up? A. Well, if the dealer were quoting 10 cents up, we ordinarily did not quote the contractor; just worked with the dealer to help him get his price.

Q. You have had many occasions, haven't you, where you quoted contractors at the same time dealers were quoting them? A. No, not very many. Our regular practice would be if we had a dealer in a market, and protecting that dealer, the dealer would quote the contractor, we would refrain from quoting him. We would be working on the contractor trying to sell him, but without quoting him.

Q. But there had been a number of cases—I do not know how many and I am not trying to say how many—a number of cases where you quoted along with the dealers in quoting the same price the dealers quoted; isn't that correct? A. Yes, we had. We would quote from the dealers' account in those cases.

Q. And did the market there vary in different localities? A. Yes.

Q. Sometimes 10 cents? A. It might be more or less.

Q. It might be 15? A. Yes.

Q. And in cases of more than 15 cents? A. There might have been some; they would have been very few at that time.

Q. But since 1935 there have been more cases of 15 cents and more than 15 cents, than before; haven't there? A. No, since 1935, if anything, I would say that there had been less.

Q. You do not recall that in 1935 that the dealers' associations were engaged in a movement to have a 15-cent mark-up? A. Oh, I know that some of them were, oh, proved rather ineffective.

Q. In some localities wasn't 15 cents made and observed as the mark-up? A. In a great many localities it was attempted, but the observance of it was very spotty and rather short-lived.

Q. Did you have any localities which you quoted as much as 20 or 25 cents up? A. I would not want to say that there were not, but if there were they were extremely isolated instances.

Q. Your policy, I take it, varied as to the amount up that you would bid depending on the contracts and wishes of the dealers in a particular locality; is that right? A. No. Let me make it clear: Whenever we made a price under those circumstances we were not making a price there our own, but were merely naming to the contractor concerning the price which our dealer was offering cement for that work, and the cases where that would arise would be a case where the dealer might be located, let's say, in Pittsburgh, and the contractor figuring a job was in New York City. If then the dealer was quoting to the contractors on a given job 15 cents per barrel marked up, and if we, working with him, were following the contractor in New York City, we might and did act as his messenger in placing before the contractor in New York his price, but it was in no case a price at which we were willing to sell, ourselves, or were quoting for our own account.

Q. Didn't the dealer, your own dealer, quote at the same time on such business? A. Yes, he was quoting to other contractors the same price, presumably, but if he was quoting his own price to the contractor to New York City I used in my example, then we would not quote him at all.

Q. In other words, you would not quote a dealer in Pittsburgh for delivery of cement into New York City? A. No, I tried to explain frequently contractors located in New York City figure jobs as far distant as Pittsburgh. In that case Pittsburgh wants to get his price before the New York contractor, and in such cases we may act as his messenger.[4]

* * *

Q. Mr. Bowen, do I understand that your testi- agreements or understanding with its competitors mony that the Lehigh Company has never had any or with dealers regarding prices applies to the en-

[4] (R.) Tr. 27156-59.

tire period of your connection with the company? A. Yes, it does."[5]

Counsel then drew witness's attention to a telegram sent by the company from Richmond, Va. to its Allentown office on July 23, 1931, as follows:

"IGNORE OUR REQUEST IN TODAYS MAIL AND QUOTE U. S. SHIPPING BOARD NORFOLK FIFTEEN HUNDRED BARRELS TEN CENTS UP STOP NORFOLK DEALERS HAVE HANDLED WITH OTHER MANUFACTURERS AND ALL AGREE DO LIKEWISE STOP WE HAVE FAIR CHANCE FOR HALF THE BUSINESS FROM DEALERS LETTER FOLLOWS."[6]

The examination of Bowen continued:

"Q. * * * Do you say in view of that telegram that you had no agreement or understanding with dealers or with other manufacturers with regard to price on that matter? A. Yes, I do. That particular transaction was handled as I have explained yesterday, on the basis of our statement to dealers on March 16, 1931, as to what our practice would be, and on that particular transaction which, as I have already testified, is the only case of its kind that I know, and that I have, that I think ever did happen here.

I would like to say that that was simply a case in which our desire to get the better of our competitors got the better of our own judgment. That was just plain dumb.

Q. Well, do you mean that you attempted to get the better of your competitors by handling an agreement with them to bid 10 cents up in Norfolk on that occasion? A. Tried to get the better of them by improving our position with the Norfolk dealers.

Q. And bid 10 cents up as the manufacturers who did bid; is that right? A. To bid the price that the Norfolk dealers were quoting in their market.

Q. But you had the word from your own representative that the dealers had handled with the other manufacturers, and all of them had agreed to bid

[5] (R) Tr. 27162.

[6] Com. Ex. 1042 E.

10 cents up, didn't you, and you went ahead and bid 10 cents up? A. That is right.''[7]

In May 1933 Huron wrote Lone Star enclosing a copy of its marketing policy announcement of March 10, 1933 and, discussing its policy, the letter said:

> ''We believe our plan to be a clear and concise marketing method—easily understood, which was formulated in an honest attempt to arrive at stabilization. There are certain generally known types of business that are sold direct in Michigan. However, our plan was devised with the intent of stabilizing the price to the dealer—which would enable him to establish his own resale price in his own community, without any attempt on our part to control it.''[8]

In July, 1933, Mitchell, Secretary of the Virginia Lumber & Building Supply Dealers Association, wrote to McKee, Vice President of West Penn referring to the Post Office project at Charlottesville, Va. He stated that the dealers were in a good position to handle this job ''and with full co-operation they can make a gross profit of about 4% and be it ever so meager they would like to take a chance on netting something out of it on that basis.''[9] The letter then solicites the co-operation of the company. McKee was examined as to this letter and asked whether it resulted in a change of his policy to which he replied:

> ''It represents our standard policy and we probably use this dealer margin as a basis of informative informal quotations to bidders on this project.''[10]

McKee replied stating that his company would be glad to cooperate. In January 1933 McKee wrote to the secre-

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[7] (R) Tr. 27163-64.

[8] Com. Ex. 422 N.

[9] Com. Ex. 549-2 H.

[10] (R) Tr. 27776.

tary of the Ohio Builders Supply Dealers Association asking for the differential the Columbus dealers were asking[11] and received a reply that they would be satisfied with 10¢.[12] In July 1933 McKee wrote the secretary of the Building Material Institute, Cleveland, Ohio and stated that his company would be glad to cooperate in support of the 20¢ differential on carload lot cement in Cleveland.[13]

Peerless in instructions to its salesmen on February 25, 1931 at the time of the break down of the Lehigh plan said:

> "Inquiries for the purchase of cement for all other uses than above specified are referred to the Building Material Dealer who may resell such cement at whatever price he may determine. When requested to do so, we will quote for the dealer's account on such work whatever price the dealer directs, provided the dealer agrees to perform the full function of a dealer insofar as the transaction is concerned, including carrying of the account involved."[14]

Russell, Vice President of Peerless, testified that it was their practice in quoting on dealer business: "to get a quotation from the dealer in that area and pass that information on to the potential customer."[15] His attention was drawn to a telegram sent to his company in April, 1934 by Robert Lake Company asking: "WILL YOU PROTECT DEALERS FIFTEEN CENTS?"[16] But the witness did not know what action had been taken in that case.

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[11] Com. Ex. 549 V.

[12] Com. Ex. 549 S.

[13] Com. Ex. 549 J.

[14] Resp. Ex. 2449 G.

[15] (R) Tr. 34497.

[16] Resp. Ex. 2453.

On February 4, 1933, McGovern of Hermitage wired Jaeger of Marquette:

"EVERYTHING OKAY ON TEN UP."[17]

McGovern testified that this wire was sent in response to an inquiry as to the dealer mark-up in his territory.[18] In August of the same year, McGovern wrote Jaeger:

> "One of the dealers of Nashville asked me to drop you a line regarding the 25¢ differential that the dealers are trying to establish in Nashville. They talked to your Memphis representative. He, as I understand it, said that while he would not disrupt this market, at the same time he did not give them the assurance that he would cooperate wholeheartedly with them.
>
> Won't you please instruct your Memphis representative to cooperate with us on this movement? Of course, if you will not protect the 25¢ differential, we would like to know it before a job of some consequence comes up."[19]

Jaeger replied stating that he was writing to Marquette's southern sales manager at Memphis and would advise more fully upon receipt of his answer.[20]

In a letter dated September 22, 1933 to dealers at Evansville, Indiana, Hermitage expressed its interest in protecting the dealers' interest in marketing cement as follows:

> "We have always been of the opinion that we should protect the building supply dealer in every way possible, but you can readily understand that it is impossible for us to sell the Government, railroads and highway construction on consumer basis, when the bigger companies quote them direct at the dealer's price. At any time they will quote this

[17] Com. Ex. 547 L.

[18] McGovern, Sales Manager, Hermitage (R) Tr. 36241.

[19] Com. Ex. 547 I.

[20] Com. Ex. 547 H.

class of business through the dealer, we will be very glad indeed to do likewise.'"[21]

In August, 1934, Milling, Chairman of the Cement Commodity Committee, Alabama Lumber & Building Material Association wrote to Hermitage asking for cooperation in supporting the dealers' Modal mark-up—15¢ per barrel.[22] Hermitage replied that they would be glad to do so.[23] In testifying that the mark-up was the dealers own, and that manufacturers had nothing to do with it, McGovern, Sales Manager of Hermitage, said:

"A. That was a 15-cent mark-up over their cost to the contractor on this job he speaks of.

Q. Well, how did you determine that 15 cents? A. He determined it; I did not.

Q. I see.

Now, what is the practice of your company with respect to your dealer's mark-up—what do you do about that? A. Well, on any quotations that we make direct, acting for the dealers, agent for the dealer, why, we quote any mark-up that he asks us to.'"[24]

In January and July, 1935 Hermitage wrote to the Georgia Retail Lumber and Building Supply Association at Macon thanking them for advising that the differential on Portland cement was 25¢ per barrel and stating that they would remember this on quotations.[25]

Manley, General Manager of Hawkeye, testifying that his company in quoting to the trade protected the mark-up given him by the dealer and that such mark-ups varied widely, stated:

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[21] Com. Ex. 547 A.

[22] Com. Ex. 547 G.

[23] Com. Ex. 547 F.

[24] (R) Tr. 36211-12.

[25] Com. Ex. 813 V, EE.

"A. Well, whenever we have an opportunity to quote for a dealer we contact him first and ascertain what mark-up he would authorize us to make for him.

Q. Has the Hawkeye Company, to your knowledge, ever since you have been with the company, ever made any effort to dictate what the dealer's mark-up should be? A. No.

Q. Well, what is the usual mark-up which you have found, if there is any usual mark-up, Mr. Manley, in your sales territory? A. There does not seem to be any standard mark-up.

Q. Well, what have you found? What mark-ups have you found in your business, day-to-day business? You say there does not seem to be any. A. Oh, as high as 20 cents, and sometimes one cent or two cents a barrel in carloads.

Q. And has there been any set policy in that respect, as you found it, or has there not been? A. It has always been very irregular.

Q. By irregular, do you mean it varies? A. Varies from month to month; it seems to vary in whatever location you are in. They have a habit of having more strict competition, I guess, or more keener competition.

Q. And does it vary from time to time as well as from place to place? A. Yes."[26]

Letzkus, Sales Manager of Pittsburgh Plate Glass testified that his company had quoted on behalf of dealers at the mark-up given by the dealer as his price to the contractor.[27]

In November 1933 Universal Atlas wrote the secretary of the New York State Builders Supply Association:

"We have notice from the Syracuse dealers that under the Builders' Supplies Trade Industry Code the Onondaga County Trading Area has been formed. We have a list of prices indicating the margin of profit as a mark up above f.o.b. car price which the dealers will quote and which they request

[26] (R) Tr. 41801-02.

[27] (R) Tr. 37935-38.

that we respect in our quotations. Naturally, we are only considering this profit mark up on quotations which we issue on that type of work which we quote thru the dealer.''[28]

The letter goes on to say that the company believed other trading areas had been formed and asking for advice as to such areas, then asking if there were towns outside such areas where the company should inquire directly of the dealer as to the prices he would authorize the company to quote in that market when quoting on his behalf. In April 1934 Universal Atlas again wrote to the same organization:

> ''In our desire to cooperate with the dealers in quoting their established prices in different trading areas, we are bumping up against a confusing situation and I am wondering if you can help me clarify same by giving me a list of the various trading areas in New York State so that we may be in better position to confer with the proper parties with respect to their local conditions.''[29]

These letters were written during the code period when dealers' mark-ups were controlled by their code provisions.[30]

In September 1936 in an inter-office communication of Coplay, the manager states that the mark-up was 5¢ quoted on four bridge jobs and 10¢ on other jobs and that the difference was due to specific authorization from a dealer who quoted 5¢ on the four bridge jobs whereas the differential in other communities was 10¢.[31]

The uncertainty concerning the dealer mark-ups and their tendency to break down exactly as did dealer differ-

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[28] Com. Ex. 914 G.

[29] Com. Ex. 914 E.

[30] Reiter, Vice President, Universal Atlas. (C) Tr. 4275.

[31] Com. Ex. 304 P.

entials and dealer discounts is indicated in a letter by E. E. Woods, Secretary-Manager of the Southwestern Lumbermen's Association written in March 1936 to A. T. Flint, Secretary of Mountain States Lumber Dealers Association. The letter stated:

> "Ever since the new cement marketing policies were announced, we have had an understanding among dealers and cement manufacturers that 15¢ per barrel is the minimum price on straight carloads of cement. Of course we have had some markets where this has broken down. Yet today at Springfield, Mo. and at Enid, Okla. cement is being sold for a margin of only two or three cents per barrel. In one instance, it was sold at actual cost.
>
> With this 15¢ per barrel set-up, we have had the complication of the fact that many dealers in Western Kansas and Oklahoma have felt they were entitled to 20 or 25¢ per barrel and with 15¢ prevailing over most of our area, this has brought about some difficulties.
>
> I am surprised at your statement that 10¢ per barrel is the prevailing price in your area. Very few sales have been made in Southwestern section at less than 15¢, and in those instances only where there has been complete demoralization as I have indicated. Dealers in Western Kansas complain that 15¢ is inadequate when the cost of the product, figuring the long freight haul is considered. We have had almost as much trouble out there over the demand for a profit in excess of 15¢ as in other sections in getting it up to 15¢."[32]

McGovern, Sales Manager of Hermitage, testified that in 1936-1937 he had mark-ups varying "from a few cents to as much as 25¢"[33] and that on numerous occasions the quotations issued by Hermitage on account of its dealers varied from those issued by competitors for their dealers.[34]

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[32] Com. Ex. 2624.

[33] (R) Tr. 36387.

[34] (R) Tr. 36386.

McCracken, Manager of the American Builders Supply Company, a dealer, examined as to maintenance or changability of dealer mark-ups, testified:

> "Q. • • • Do you have any standard or regular mark-up that you put on a barrel of cement in reselling it, Mr. McCracken? A. Do you mean from one time to another?
>
> Q. From one time to another; yes. A. No.
>
> Q. Well, on the same day, do the mark-ups vary on different jobs? A. On different sizes of jobs and on different quantities, we get more or less for the cement."[35]

W. R. Blair, Sales Manager of El Paso, Southwestern, writing his weekly letter to Merrill, President, on May 16, 1936, recorded:

> "The lumber yards here have asked us to fix the resale price in El Paso as we did at one time prior to the Code and Liebreich and I are contacting the yards individually to get their ideas before adopting this new policy. This may require a little more work on our part but believe it is worth while in view of the good will it creates with the dealers."[36]

One month later the company set a retail price of 85¢ per sack l.c.l. deliveries.[37] Blair testified as to this matter and stated that the company had never refused to sell a dealer who failed to observe this retail price and that the price was set at the request of the dealers.[38]

In discussion among counsel and the Examiner during Blair's testimony as to the admission of evidence dealing with dealer resale prices, Mr. Wooden, Counsel for the Commission, said:

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[35] (R) Tr. 36792.

[36] Com. Ex. 1275 E, F.

[37] Com. Ex. 1276 D, E.

[38] (R) Tr. 38889.

"Your Honor, I do not believe that the case contains any issue regarding the method of fixing re-sale prices, as such. If there is any isolated material in along that subject, it is because of the relationship it bears to the cooperation between Respondents' customers as a class, dealers' trade, just like the proposition of what classes of trade are proper trade for the dealer and what classes of trade are proper for the manufacturers. It goes to the question of cooperation, and not what the prices are, or what the re-sale prices are, or dealers' margin, or anything of that sort."[39]

On July 21, 1931 the United States Shipping Board Merchant Fleet Corporation, Supply Department, Norfolk, Virginia, issued invitations to Lehigh, Lone Star, North American and Universal Atlas and to cement dealers in Norfolk, Virginia for bids on 1,500 barrels. The Richmond office of Lehigh wrote to the Allentown office two days before the bids were to be opened referring to a conversation with Mr. Hagan of Roberts & Hagan, Inc., the Norfolk dealer, and saying:

"The Norfolk dealers wanted some dealer to have the business and all were agreed to quote 10¢ per barrel differential—that they, the dealers, had positive assurance from the Lone Star that they would not quote, or else quote 10¢ high. The dealers were handling with the Atlas and Security and felt certain they would hold off or quote 10¢ up.

I told Hagan that under the circumstances we would play ball with them with the understanding that if they could not get the Security and Atlas in line he would notify us and we would use our own discretion. Hagan readily consented to this and thought it was only fair—later in the day calling me up, saying that they had the Security lined up, but had not been able to communicate with the proper official of the Atlas. Under the circumstances, I telegraphed

[39] Tr. 38874-75.

you last night as per the attached confirmation requesting that you quote 10¢ up."[40]

The telegram and Lehigh's response to it was discussed by Bowen.[41] Lehigh received no part of the award and it appeared that the successful bidder had placed the order with Lone Star who had not bid direct. Lehigh's dealer suspected that Lone Star had induced another dealer to put in a bid at 5¢ and had thus secured the business by quoting the dealer's mark-up.[42] Commenting further on this incident, C. S. Wheat of the Richmond office wrote the Allentown office of Lehigh:

> "All of my time here was with Mr. Hagan who gave me full details of how they attempted to line this business up for some Norfolk dealer on the basis of 10¢ per barrel differential. It seems they first approached Fontaine, Sales Manager of the Lone Star who assured them of their cooperation but at the same time was griping because they didn't think the outside manufacturers should have a chance at the business. The Lone Star salesman later came in and talked along the same lines. Hagan was a little apprehensive lest they would quote direct so he and one of the other dealers went to see Dwight Morgan [General Manager of Lone Star at Norfolk]. Morgan likewise played the baby act, saying they were entitled to the business, etc.
>
> Since matters turned out as they did Hagan is convinced until proven otherwise that Marshall the local Lone Star salesman tipped Jacocks off towards getting a bidding proposal and instigated the 5¢ differential. Hagan says all the dealers are sore about it and are going to discuss it at their meeting next week. In the meantime they hope to develop the true facts and says that if their suspicions are correct

[40] Com. Ex. 1042 D.

[41] Com. Ex. 1042 E; (R) Tr. 27163-64, *supra*, pp. 2487-88.

[42] Com. Ex. 1042 H, I.

Lone Star is going to be penalized. Whether they will actually do it or not remains to be seen."[43]

Russell, Vice President of Peerless, was asked whether that company ever attempted to fix or control the resale mark-up quoted by its dealers, and he replied that the company had not, and then added:

"I must state we have always been interested in this matter, but it is taken care of automatically by the competition as between dealers, and ourselves, as manufacturers cannot influence that particular phase.

By Mr. Withrow:

Q. What do you mean when you say it is taken care of by competition, Mr. Russell? A. I think of one particular instance where we sold cement to a dealer in Grand Rapids. The quantity was so large that that dealer was not able, in the face of his competition, to get the same margin of profit he had been getting on smaller orders, and there was a lot of competition as between dealers as to how much he could get."[44]

4. The Institute and the Code Authority and Dealer Mark-ups

Reiter testified that The Cement Institute [and the Cement Code Authority had nothing whatever to do with suggesting the Modal mark-up in the dealer Code and that the Code Authority] never attempted to set or fix dealer differentials.[1] [When a complaint was registered with the Code Authority against Pittsburgh Plate Glass for quoting cement at a price above its filed price, Letzkus of Pittsburgh Plate Glass wrote to the Code Authority asking how he could quote to a contractor on a job which required

[43] Com. Ex. 1042 K.

[44] (R) Tr. 34399-400.

[1] (C) Tr. 16937.

dealer service and with knowledge that the price under the dealers' Code should be 15 cents higher than his price to the dealer.[2] The Code Authority then issued explanation #62-A, dated April 16, 1934 declaring:

> "We suggest to meet the situation described, that the member of this Industry secure specific authorization from dealer or dealers to quote to contractor definite price fixed by such dealers, and then word his quotation to the contractor substantially as follows:
>
> 'We are authorized to quote by and for the account of ..... (dealer or dealers) * * *'
>
> It is understood that in the situation described, any sales resulting from such quotation will be made by the dealer named in quotation to the contractor and by the member of this Industry to the dealer."][3]

F. Protection of Dealer's Territory.

The manufacturer, having secured a dealer who was willing to promote his brand in the dealer's territory, sought to protect that outlet by protecting the dealer against competition from his brand by dealers from other localities.

[In 1915 the Report of the Committee on Trade Conditions of the Association of American Portland Cement Manufacturers stated:

> "In many cases quotations are made to dealers in towns other than their home towns, where they are not regularly engaged in business as building material dealers. By reason of this condition, and having no investment in such towns, such dealers frequently sell cement for delivery f.o.b. cars at such towns at a margin of profit smaller than the margin recognized and observed by building material dealers regularly engaged in business in those

[2] Com. Ex. 1020 D.

[3] Com. Ex. 1020 F.

towns. This deprives the latter dealer of business to which he is justly entitled, and causes demoralization and dissatisfaction.

[Italicized part quoted in Fdgs. Par. Seventeen (b)]

Therefore, the Committee recommends *that no dealer be quoted for shipment to any town other than his home town except at consumer prices, excepting only in towns adjacent to his home town in which there is no dealer.*"][1]

In March 1916 Alpha, in a memorandum to its salesmen, directed:

"Effective at once, please do not sell dealers in one town for delivery to another town except at the regular consumer's price, unless the town at which the dealer wants the price is immediately contiguous to, or, in other words, within practical trucking distance of the town in which the dealer is located.

This provision will apply in Pennsylvania west of the eastern boundary line of the following Counties: Erie, Crawford, Venango, Clarion, Armstrong, Westmoreland and Fayette; in the entire state of West Virginia and all the territory west of this line."[2]

And in July 1917 Coogan, Vice President of Alpha issued an inter-office memorandum stating:

"Effective at once, please do not sell dealers for shipment to any point other than their home town except that we may sell them to towns located within practical trucking distance of their warehouse.

In the event it is absolutely necessary to quote a dealer for shipment to other than his home town, we could quote him not less than our consumer's price at the point of delivery."[3]

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[1] Com. Ex. 3193, pp. 11-12.

[2] Resp. Ex. 523.

[3] Resp. Ex. 524.
See also Resp. Ex. 529: Alpha interoffice memo 5/3/29.

Coogan was examined as to the purpose in issuing the instruction contained in Respondent's Exhibit 523 and the reason for objection to the sales to one dealer for resale in the territory of another, and he answered:

> "Because it interfered with our dealer relations, and once in a while you will probably have exclusive arrangements, and other things of that sort.
>
> Furthermore, a person shipping into a market where he has no investment and no facilities to serve the public—we felt that that was unfair to the people who do maintain regular facilities for serving the public in those particular markets."[4]

[In the publication entitled, "Trade Practices in the Cement Industry" issued in January 1919 by the Portland Cement Association, the consequences of selling to dealers for delivery in towns other than those in which they are regularly engaged in business and the limitations upon such practice are set forth as follows:

[Italicized part quoted in Fdgs. Par. Seventeen (b)]

> "In many cases quotations have been made to dealers in towns other than their home towns, where they are not regularly engaged in business as building material dealers. By reason of this condition and having no investment in such towns, such dealers frequently sell cement for delivery f.o.b. cars at such towns at a margin of profit smaller than the margin recognized and observed by building material dealers regularly engaged in business in those towns. This deprives the latter dealer of business to which he is justly entitled and causes demoralization and dissatisfaction. Therefore, *a dealer should be quoted the consumer price on cement for shipment to any town other than his home town, except that it is proper to quote the dealer price to such a dealer on cement for delivery in towns adjacent to his home town in which there are no dealers.*"][5]

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[4] (R) Tr. 23315-16.

[5] Com. Ex. 3192, p. 9.

The survey of trade practices made in connection with the old cement case[6] disclosed that most companies did not at that time restrict their sales to the dealer's home town and his immediate vicinity.[7]

In its announcement of policy in the brochure entitled, "Trade Ethics and Marketing Policies" published in 1929, Lone Star declared that its cement "will be marketed in each community only to and through the recognized and established building material dealer or dealers regularly serving such community."[8]

[The Cement NRA Code made no specific provisions limiting sales to dealers only in their own territory but it did provide:

[Italicized part quoted in Fdgs. Par. Seventeen (d)]

["*1. Except as otherwise specified, portland cement shall be marketed in each community through the building material dealers regularly serving such community.*"][9]

In December, 1933, a few days after the code went into effect, the Peoples Coal Company of Lawrenceburg, Indiana, wrote to the Code Authority charging that Superior had been selling cement into its territory, direct or through a Cincinnati dealer, and saying:

> "We object to this way of doing business and ask that you advise by return mail the procedure to take. * * * The dealers in this are objecting to this way of doing business and ask that you please advise if the cement company can sell direct to a contractor and if a dealer in another area can sell outside that area."[10]

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[6] *Cement Mfg. Protective Assn.* v. *United States*, 268 U. S. 588.

[7] Resp. Ex. 3788.

[8] Com. Ex. 1112, p. 5; Resp. Ex. 21, p. 5.

[9] Com. Ex. 557, p. 339.

[10] Com. Ex. 1019 A.

To this the Code Authority replied:

> "This will acknowledge your letter of December 19. So that you may be fully informed we enclose a copy of the Code of Fair Competition for the Cement Industry, and we refer you to Article XI of this Code for the policy of the Cement Industry bearing on the matter contained in your letter.
>
> We are sending a copy of your letter together with a copy of this reply, to the Superior Cement Corporation, Portsmouth, Ohio." [10a]

In February 1929 Hermitage wrote the Fairfield Building Supply Company in Fairfield, Alabama, that they could not sell that dealer on a dealer's basis at Gadsden, and then went on to say, "It is against our policy to sell one dealer in another dealer's territory, so could not ship you at this point." [11]

Of like tenor are many other letters by Hermitage to dealers introduced in the evidence.[12]

When in March 1936 the Textile Lumber Dealers Association of Greenville, South Carolina, complained to Hermitage of the sale at Greenville by the Taylors Lumber Company, not located in Greenville,[13] Hermitage replied that they had "no such order on our books and, of course,

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[10a] Com. Ex. 1019 A.

[11] Resp. Ex. 2679.

[12] Resp. Ex. 2680: Hermitage to a dealer dated February 27, 1929.
Resp. Ex. 2681: Hermitage to a dealer dated March 25, 1929.
Resp. Ex. 2682: Hermitage to a dealer dated May 8, 1929.
Resp. Ex. 2683: Hermitage to a dealer dated March 10, 1930.
Resp. Ex. 2684: Hermitage to a dealer dated March 29, 1930.
Resp. Ex. 2685: Hermitage to a dealer dated June 2, 1930.
Resp. Ex. 2686: Hermitage to a dealer dated September 18, 1930.
Resp. Ex. 2662: Hermitage to a dealer dated January 5, 1931.
Resp. Ex. 2663: Hermitage to a dealer dated July 27, 1932.
Resp. Ex. 2691 A: Hermitage to a dealer dated August 1, 1936.

[13] Com. Ex. 877 M.

would not ship any dealer to Greenville other than a Greenville dealer.'"[14]

Hermitage wrote the Kentucky Retail Lumber Dealers Association at Louisville, Kentucky, on November 9, 1936:

> "Your letter November 6th regarding 800 bags of cement secured by Irvington bidder for delivery to Elizabethtown.
>
> We are glad you called our attention to this, and, of course, under our policy we would not make shipment for the Irvington dealer."[15]

And on June 23, 1937 Hermitage wrote the same association:

> "We have never allowed one dealer to ship in another dealer's territory in the state of Kentucky, and do not intend to change our policy at this time. As you know, this is one of the rules we stick to 100% and are going to continue."[16]

McGovern testified that he could not remember the time when it was not the policy of Hermitage to refuse to sell a dealer in another dealer's territory and that this policy was not the result of complaints of dealer associations or the product of cooperation with any dealer associations or other cement manufacturers.[17] Stating the reasons for the policy, McGovern said:

> "A. Well, if we sell one dealer right in the face of another dealer, especially our dealer, why, it causes him to become dissatisfied, and sooner or later we lose our dealers, which is the backbone of our business."[18]

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[14] Com. Ex. 877 J.

[15] Com. Ex. 547-2 I.
Com. Ex. 547 P: Hermitage to Kentucky Lumber & Supply Assn. dated March 22, 1937.

[16] Com. Ex. 547 M.

[17] McGovern, Sales Manager, Hermitage (R) Tr. 36214-15.

[18] Id., Tr. 36215-16.

In January 1932 Edison, in its instructions to its salesmen, wrote, "Since our policy is one of protection to the local dealer, no sales will be made for one dealer's account in another dealer's territory, without the approval of the home office."[19]

However, on July 31, 1935 Edison circularized its salesmen on the subject of dealer protection and made the following statement:

> "For some time, we have followed the policy of confining shipments to a dealer to his home town, or what is known as his normal trading area. There is such a difference of opinion as to what constitutes the latter that in order to place us in a competitive position, we will adopt as a policy the selling of a dealer anywhere, provided, of course, that such sale will not conflict with our own local dealer situation."[20]

Examined upon this announcement, Sweeney testified to the importance of protecting the dealer's interest and its conflict with the necessity of the manufacturer in meeting his competition:

> "A. Well, the dealer end of our business is a very important, if not the most important part of it, and it is quite necessary, by reason of that, that we make every effort to retain the good will of our dealers. If we did not respect to some extent the territory into which we make shipments to those dealers by permitting outside dealers to get in there, our dealer business would rapidly disappear.
>
> Q. Now, as I understand it, this memorandum of yours represents some change in that policy? A. Yes.
>
> Q. Will you explain what the change was, and what was the reason for it? A. Well, we found in a number of cases competitors were not following the same policy with regard to shipments to dealers

[19] Resp. Ex. 2566 C.

[20] Resp. Ex. 2586.

that we were following. In a number of cases, a manufacturer would ship a carload of cement to a point possibly twenty or thirty miles removed from the dealer's home town, and while we did not subscribe to this practice, at the same time we found it was costing us a fair amount of tonnage, and decided to meet that competitive condition, unless by so doing we interfered with some valuable dealer account."[21]

In January 1934, during the Code period, Gilson, Sales Manager of Union, at Ogden, Utah, wrote to Keller of Pacific:

"Kindly advise how the Central California dealers are handling this question of selling to a dealer in one locality for delivery in another locality in which he does not have a yard even though the contractors who might secure a job are located in this territory.

This, of course, is rather a vexed question and is causing us in Utah quite a little inconvenience, but we are adhering strictly to the literal interpretation of the Code and have refused to make shipments for a dealer to points where he has no established place of business, and where normally he does not serve the adjacent trade."[22]

When in October West Penn was asked by a dealer at Fredericktown, Ohio, to quote on about five cars for WPA work for delivery at Mansfield, Lexington, Mount Vernon and Fredericktown, all in Ohio, West Penn refused to do so.[23]

In February 1935, however, West Penn wrote to one Rush, Builders Supply Dealers of Eastern Pennsylvania, to inquire whether there would be any objection to the sale of carload cement to Harrisburg dealers for delivery at

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[21] Sweeney, Vice President, Edison (R.) Tr. 35766.

[22] Com. Ex. 954 U.

[23] Com. Ex. 549-4 Y-4 Z.

Steelton in view of the fact that at Steelton the dealers were small and Harrisburg dealers were regularly retailing there.[24]

McKee testified that he wrote this letter because the company had received an inquiry from the Bethlehem Steel Company, who "desired it to be shipped to or through the account of a Harrisburg dealer." He testified:

> "We already had a dealer at Steelton.
>
> It is the practice in many metropolitan areas to consider certain suburbs as a portion of the general marketing area, and dealers in one section ship to another, and vice versa.
>
> We did not want to ship for the Harrisburg dealer's account into Steelton if there was no precedent for so doing. We did not want to inquire of the Steelton dealer because his reply might be biased, or we might unnecessarily stir him up. We did not want to inquire of the Harrisburg dealer because he would also be biased, and the only source that seemed to be fair minded was to inquire of Mr. Rush, whom we presumed was familiar with the conditions.
>
> • • •
>
> Q. Mr. McKee, if you feel it is advantageous to ship to a Harrisburg dealer for delivery to Steelton, why don't you go ahead and do it? A. Because we would lose the regular business of the Steelton dealer if it had not been a previous practice.
>
> Q. Well, what was your—when you wrote this, what was your attitude,—did you or did you not feel that the precedent would be sufficient answer to your Steelton dealer if he complained to you? A. We feel that the precedent would be sufficient answer."[25]

In December 1935 Johnson, President of Aetna, writing to Lingemann, Vice President of that company, setting forth the policy of Aetna, stated:

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[24] Com. Ex. 549-4 I.

[25] McKee, Vice President, West Penn (R) Tr. 27764-65.

[Italicized part quoted in Fdgs. Par. Ten (i)]

"It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except into his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him."[26]

In June, 1936 in a circular addressed to the trade, Union stated:

> "The company feels that the dealer or dealers of the community are entitled to whatever cement business there may be in that community, and that it is unfair for outside dealers to attempt to secure business which rightfully belongs to the local dealers, as this practice not only disrupts the market but creates friction between the dealers and trade generally.
>
> Therefore, this company will decline to accept orders for cement to be delivered into territory which you do not normally serve."[27]

In August, 1936, W. R. Blair, Sales Manager of Southwestern, Texas, in a letter to the President of the company stated:

> "As you know, the El Paso proper price was raised arbitrarily to prevent the El Paso dealers from shipping out into the territory, but I believe we can handle this situation should any occasion arise as we have the dealers here pretty well educated that they are not to ship out of their own territory."[28]

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[26] Com. Ex. 45.
Evidence as to this conference is digested in Part XIII, Sec. B, *supra*, pp. 2214-23.

[27] Com. Ex. 736 D.

[28] Com. Ex. 1276 F-G.

On the stand, when examined on the policy of refusing to sell dealers outside of their own territory, and stating that it was done for the protection of the company's own business interests, Blair testified:

> "Q. Well, didn't you testify in the Texas case that you attempted to enforce a policy of not shipping into another dealer's territory on the part of a dealer who did not have a place of business at the point of destination? A. I may have so testified.
>
> Q. Well, it is a fact, anyway, isn't it, that that has been your policy? A. That has been our policy, as I say, ever since I have been with the company.
>
> Q. Have you had cases where dealers requested such shipments? A. Very few.
>
> Q. And you have declined to make them, when requested? A. In some cases, yes, sir.
>
> Q. Isn't that done in order to protect the dealer at the town to which shipment is requested from the competition of the other dealer? A. It is done to protect what we consider our own individual company's business interests.
>
> Q. And your own company's individual interests are tied up pretty intimately with the wishes and the good will of your dealer customers? A. Yes. If we did not have any dealer good will we would not have any dealer business."[29]

G. E. Warren of Southwestern, Ohio, when asked why he did not allow the practice of selling dealers outside of their own locality replied: "To preserve our position in the other localities and to retain the good will of customers sold there."[30]

In April, 1937, Three Forks answering an invitation from a dealer in Missoula to quote for shipment f.o.b. Ft. Browning, Montana, replied:

> "In keeping with our general policy of long standing, we could not quote you on a dealer's basis

[29] (R) Tr. 39293.

[30] (R) Tr. 29124.

f.o.b. Fort Browning. This territory is handled by the Browning dealers."[31]

The policy of several companies was not consistent and followed a purely opportunistic line. Thus in June, 1936, Ackerman, the Sales Manager of Lawrence, wrote to a District Sales Manager:

> "In case there is any question in your mind concerning our policy, let me repeat it to you again. So far as a regular dealer is concerned, we do not have to confine him to shipments to his home town. We are willing to ship him to any destination he desires, provided it is to our best interests to do so. We would not ship a Massachusetts dealer, we will say, into Bangor, Maine, because we know that our relationship with the Acme Manufacturing Company would be jeopardized. If, however, there is some particular town in Maine where we have no dealer and have been unable to establish one, we would have no objection to shipping another good dealer to that destination. Each case must be decided on its merits."[32]

On the stand Ackerman testified that Lawrence did not always confine its shipments to a dealer's own territory but that shipments outside the town were the exception.[33]

In October, 1936, Twamley, the Vice President of Coplay gave instructions to its Philadelphia office that the policy of shipping a dealer only to its home town would hereafter prevail at all points in Pennsylvania, west of the north and south line drawn midway between Huntington and Altoona.[34]

On the stand Twamley testified that it was not the policy of the company to sell retailers for delivery only at the

[31] Com. Ex. 735 A.

[32] Com. Ex. 270 A.

[33] (C) Tr. 7355-56.

[34] Com. Ex. 304 Q.

points where they had a yard[35] and that the direction to the Philadelphia office above affected territory in which the company usually did not sell and only because he had received protests from that territory into which he had made a sale on a PWA inquiry.[36] Twamley said: "We ship a dealer now anywhere in the vicinity of his home town within reason."[37]

J. E. Nelson, Vice President of Wolverine, testified that that company did not sell a dealer "except in his own home town or in his marketing area, unless he maintains a warehouse at that other point."[38]

Dannelly, Vice President of National testified that National sold the dealer only in the town where his place of business is located, and in explanation of the policy stated:

> "A. More or less self preservation, because if we did not follow that procedure the dealers in other towns would not do any business with us, and one by one we would lose them.
>
> Q. How long have you been doing that? A. Oh, as far back as I can remember; when I came with the company.
>
> Q. Does that policy have any relation to maintaining your prices, or anything of that kind? A. I do not see how it does.
>
> Q. Well, now, who determines what is the natural market for your dealers? A. Well, the dealer, himself, determines that by his activities, but our company reserves the right to say that we won't sell him anywhere else except where we believe his place of business and his trade area is located."[39]

Pearson, Secretary-Treasurer, Cumberland, stated the same policy generally for Cumberland, saying:

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[35] (C) Tr. 6805.

[36] (C) Tr. 6808.

[37] (C) Tr. 6807.

[38] (R) Tr. 36040.

[39] (R) Tr. 39571-72.

"We would lose the good will of the dealer in whose territory we permitted shipments to a competitive dealer."[40]

Returning to the subject he pointed out that the dealer could ship his own cement into whatever territory he wished and that the restriction was only upon shipping for his account into another dealer's territory. Asked if he were shipping to a territory where he did not have a dealer, he answered that he would do it if he wanted the business badly enough, and he felt sure that his company had done it on several occasions.[41]

Eleock, Vice President of Southern States, testified as to the common sense of this policy of protecting the dealer's territory:

"Q. Does your company have any policy with respect to selling a dealer at a point where you have another dealer? A. Yes, sir; we most distinctly have.

Q. What is that practice? A. We will not sell a dealer—that is, we will not sell a dealer at point A if that dealer comes from point B, provided we already have a dealer at Point A.

Q. How long have you had such a policy as that? A. That has been my policy as long as I have been in the business and have anything to do with sales.

Q. What is the reason why you have that policy in your company? A. The common sense—if you did not do it you would lose the other dealer."[42]

Horner, President of Kosmos, stated the basis of his policy on out-of-territory dealer sales as follows:

"A. No. We only sell a dealer for delivery at the town where he is equipped to do a dealer's business.

Q. Would you tell us what your reasons are for

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[40] (R) Tr. 39839.

[41] (R) Tr. 39887-88.

[42] (R) Tr. 37529.

that practice? A. Well, unless he is equipped to do a dealer's business in a town he cannot represent us properly."[43]

Robeson, Vice President of Nazareth, asked if in selling at delivered prices his company considered the protection of the dealer in any way, replied:

> "A. Well, you do to this extent: In a market where we would have a particular dealer who had been associated with our brand for a long time, why, naturally we would have to protect that market, and prevent, if we could, people coming from outside with our brand in that market, if we wanted to hold the good will of that particular dealer."[44]

Representatives of several companies testified that their policies in opposition to selling dealers for delivery outside of the territory in which they had their warehouses and rendered service, was not the product of any agreement between manufacturers.[45]

1. The Institute and Protection of Dealer Territory

On December 3, 1935, in connection with sales to dealers who were bidding on WPA work, Reiter, as General Manager of the Institute, answering an inquiry from Monolith concerning an award to Phoenix dealers by the Arizona State Procurement Office for delivery at various places throughout the state, wired:

> "* * * ALL SALES POLICIES WITH WHICH WE ARE FAMILIAR PROHIBIT SALE TO DEALER AT ANOTHER DEALERS TOWN AND GENERALLY PROVIDE FOR SALE TO DEALER AT HIS OWN DESTINATION * * * WE HAVE DISCUSSED SALE TO GOVERNMENT BY

[43] (R) Tr. 36963.

[44] (R) Tr. 28003.

[45] Dannelly, Vice President, National (R) Tr. 39571-72.
Elcock, Vice President, Southern States (R) Tr. 37529-30.
Hogan, President, Lone Star (R) Tr. 34572-73.

DEALERS AT OTHER DEALERS DESTINATIONS WITH OFFICERS OF BOTH NATIONAL DEALERS ASSOCIATIONS AND SEVERAL STATE DEALERS ASSOCIATIONS AND ALL AGREE WITH US THAT THIS IS BAD PRACTICE LEADING TO DESTRUCTION OF DEALERS BUSINESS AND DIRECT SELLING BY MANUFACTURERS NOT CONTEMPLATED BY CEMENT COMPANIES POLICIES OR DESIRED BY DEALERS * * *"[1]

Five months later on May 1, 1936 the Stearns Coal and Lumber Co., Inc. telegraphed the Institute:

"UNDERSTAND R J SMITH COMPANY SOMERSET KENTUCKY ACCEPTED WPA ORDER FOR CARLOAD CEMENT DELIVERED STEARNS KENTUCKY STOP THIS IS OUR TERRITORY AND WE EXPECT PROTECTION FROM YOU UNDER BULLETIN ELEVEN"[2]

The Institute replied immediately:

"RETEL THE CEMENT INSTITUTE HAS NOTHING TO DO WITH THESE MATTERS STOP SUGGEST YOU TAKE UP WITH COMPANIES WITH WHOM YOU DO BUSINESS"[3]

2. Attitude of Dealers' Associations

Reiter was asked as to his knowledge of the attitude of dealers' associations in respect of out-of-town dealer sales. He testified:

"The Witness: I, myself, had contacts with officers of national dealers' associations and I know that their information was that dealers' sales should be confined to the territory that he normally served.

By Mr. Wooden:

Q. What associations do you have in mind there? A. The National Retail Lumber Dealers' Association and I have forgotten the exact name of the other one, but it was the National Builders' Supply Association, I think."[4]

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[1] Com. Ex. 1022 NN, OO, *supra*, p. 2414.

[2] Com. Ex. 202 CC.

[3] Com. Ex. 202 BB.

[4] (C) Tr. 4329.

After drawing Reiter's attention to his wire in which he stated that dealers' organizations agreed "with us that this is bad practice,"[2] referring to dealer sales in other dealers' territories, Reiter testified:

> "A. Yes. My reason may have been quite different from theirs, Mr. Wooden.
>
> Here was the outlet for something more than 50 per cent of our material. And it was my opinion that the industry should give due weight to that fact.
>
> Their opinion was probably based on the autonomy of various members of their association.
>
> • • •
>
> Q. Ordinarily would you say that unless the dealer from outside made his price lower than the local dealer that he would not be favored with the business in the other dealer's town? A. Yes, I think that is right."[3]

3. Diversions of Cement in Transit

One aspect of the protection of the territory of dealers is the matter of diversion of cement in transit from the destination to which it is sold to some other destination. This whole subject is dealt with in Part VIII, *supra*.

G. Influence of Dealers on Marketing Practice, Terms and Conditions.

The consideration which a seller has for buyers would seem to need no explanation. This is particularly true when under the conditions of his business the seller must meet the same buyers in the same markets day in and day out. Yet the record is replete with testimony and exhibits

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[2] Com. Ex. 1022 oo, *supra*, pp. 2513-14.

[3] (C) Tr. 4349.

disclosing the consideration which the cement manufacturers gave to the interests of their dealer customers.

This evidence has in large part been reviewed in the account of the importance of the dealer[1] and the protection given to his interest in the sale of cement by efforts to protect the retail market which he serves[2] and his profit in that market.[3]

The influence of the dealers derived from their control of the retail outlets, the freedom of choice which they had in preferring one brand of cement to another and in the influence which their organizations did or could exert. The force of this influence was used to secure for each dealer the most favorable terms offered by any manufacturer to a competing dealer and thus to secure uniformity of practice throughout each competitive area.

1. The Dealer Chooses What Brands He Will Carry

There are very few dealers who handle one brand exclusively.[1] Substantially all dealers buy from one or more

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[1] *Supra*, Sec. A of this Part, p. 2247 *et seq.*

[2] *Supra*, Sec. F of this Part, p. 2499 *et seq.*

[3] *Supra*, Sec. E of this Part, p. 2433.

[1] Coogan, Vice President, Alpha (R) Tr. 23306-07, 23627.
Scott, H. M., President, Keystone (R) Tr. 27633.
Bates, J. E., Sales Manager, Federal (R) Tr. 30684.
Warren, F. B., Vice President, Bessemer (R) Tr. 32182.
Dannelly, Vice President, National (R) Tr. 39547.
Alexander, President, Missouri (R) Tr. 37217.

manufacturers.[2] Robeson, Vice President of Nazareth stated that dealers generally carry from two to fifteen different brands depending on the size of the market and that they were usually fully informed as to the market price of cement.[3] Nearly all dealers are solicited by a number of companies.[4]

The dealers are generally opposed to direct sales and want all cement to pass through their markets.[5] Alexander

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[2] Coogan, Vice President, Alpha (R) Tr. 23306-07, 23627.
Scott, H. M., President, Keystone (R) Tr. 27633.
McKee, Vice President, West Penn (R) Tr. 27714.
Elliott, Vice President, Whitehall (R) Tr. 28575.
Warren, F. B., Vice President, Bessemer (R) Tr. 32182.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36485.
Dannelly, Vice President, National (R) Tr. 39547.
Alexander, President, Missouri (R) Tr. 37217.
Brooke, Vice President, Monarch (R) Tr. 42194.
Com. Ex. 2654: Letter dated 6/12/31, Hay, Sales Manager, Universal Atlas, to Stone, General Sales Manager.
Resp. Ex. 2588: Interoffice memorandum dated 7/30/31, Wetzler, Edison to salesmen.

[3] Tr. 28022.
See also Scott, *supra*, Tr. 27633.

[4] McGovern, Sales Manager, Hermitage (R) Tr. 36218.
MacDonald, B. A., *supra*, Tr. 36485.
Horner, President, Kosmos (R) Tr. 36962.
Brooke, *supra*, Tr. 42194.

[5] Coogan, *supra*, Tr. 23594.
Russell, Vice President, Peerless (R) Tr. 34494.
Alexander, *supra*, Tr. 37412.
Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 38902-03.
Robeson, Vice President, Nazareth (R) Tr. 28462-63.
Rader, Vice President, Lehigh (R) Tr. 12963-64.
Runion, Secretary, Nebraska Lbr. Merchants Assn. (C) Tr. 12063-64.

testified as to the desire of the dealers to sell all the cement that is sold but that "in some territories that feeling seems to be more acute than in others."*

2. Deference to the Customer

The evidence is abundant throughout every section of this Part that the goodwill of its dealers was important to each company and the demands of good salesmanship required attention to their protests, demands and requests.

Thus in December, 1925 the General Sales Manager of Alpha wrote an interoffice memorandum stating:

> "We have been criticised by Alpha Dealers because we have sold State Institutions at the same price as we would sell a dealer. These Alpha Dealers have requested that we discontinue this practice, and because of our policy of co-operation with the dealer to the fullest possible extent, we have determined to meet their views in this matter.
>
> You will, therefore, effective at once, quote all State Institutions at our consumer's price. We will continue quoting The Federal Government, the Railroads, and State Highway Departments, the price as we would quote a dealer.
>
> Please notify your men to this effect immediately and urge them to give publicity to the fact that we have determined on this policy, so that

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Com. Ex. 458 A-C: Southwestern Lumbermen's Association to Penn-Dixie, 8/9/35.

Com. Ex. 547 B: Lensing Brothers, Inc. to Hermitage, 9/20/33.

Com. Ex. 867-7-E: Illinois Lumber & Material Dealers Assn., Inc. to Alpha, 10/17/34.

Resp. Ex. 1500: Paramount Builders Supply Company to Nazareth, 9/11/33.

Resp. Ex. 797: De Forest & Hotchkiss Company to Alpha, 4/22/38.

Supra, pp. 2305, 2335 *et seq.*

* Alexander, President, Missouri (R) Tr. 37412.

dealers generally, may know of our desire to cooperate with them."[1]

In 1915 Dewey issued a pamphlet under the title of "Dewey Doings" intended for its dealer customers and drawing specific attention to the advantages which it offered its customers and stating its desire "to fully cooperate with the dealers to the end that the trade may be cared for in a way that will leave nothing to be desired."[2]

When the NRA Code was under discussion, Hogan, then Vice President of Lone Star, wrote to MacFarland, Vice President of Medusa, that the Code as proposed failed to state the dealers' and contractors' present and future position in the sale of cement, and stated:

> "In our opinion it would be a mistake for the industry to submit a code in Washington that would, because of the deficiencies pointed out, be displeasing to the dealers, contractors and concrete product interests, and thereby serve to add greatly to the burden of illwill under which the industry now suffers.
>
> You will observe that the suggestions we offer do not include any drastic changes, but are simply a recognition of present selling policies of many of the manufacturing companies."[3]

Typical of many letters addressed to manufacturers is that of December 16, 1935 by G. F. Erich Company, dealers at Allentown, Pa. to Nazareth Company, as follows:

> "Under date of December 3rd, the dealers of the Lehigh Valley trading area asked you, to refrain from bidding on work direct, in accordance with Paragraphs 1 and 2 of Suggested Sales Policies sent out by cement companies, February 21, 1935. How-

[1] Resp. Ex. 675.

[2] Resp. Ex. 3629.

[3] Resp. Ex. 2176: Letter dated 6/22/33.

ever, we notice under date of December 11th, that your company quoted direct on WPA Inquiry 3-79 on a carload of cement. Will you kindly refrain from bidding any future jobs which are not built by the government direct?'"[4]

Dealers' protests to manufacturers were most insistent during the period of widespread federal relief projects. They objected to the sale of cement for these projects direct.[5]

Alpha, replying to the protest from H. F. & A. J. Dawley, a dealer at Norwich, Connecticut, wrote on April 27, 1938, concerning bidding f.o.b. mill to the Procurement Divisions:

"We believe that the application of this privilege would short circuit many of our sales which are now made through established local dealers, and would greatly disrupt the present method of dealer distribution.

Our Company depends very largely on a dealer organization, patiently built up over a long period of years, with the expenditure of much effort and money. We naturally are doing everything within our power to maintain the good will of this important sales outlet.

We gave considerable study to the Government's request for bids, and came to the conclusion that it would be to the best interest of our Company, and, as well, of all of our dealers if we were not to bid.'"[6]

Of similar import is a letter to The De Forest & Hotchkiss Co., dealers in New Haven on April 23, 1938.[7]

Sweeney, Vice President of Edison, speaking of the demand by dealers that all cement be sold through them, testified:

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[4] Resp. Ex. 1614.

[5] *Supra*, pp. 2334 *et seq.*; 2385-2403.

[6] Resp. Ex. 799.

[7] Resp. Ex. 798.

"A. Well, of course, we gave every consideration to the views of our dealers on this important matter since the backbone of our business has always been the dealer end of it, and in shaping our policy, which was later issued, we gave every consideration to going along with the dealers in their views as far as we could and at the same time meet competition."[8]

Porter, President of North American, testified that his company furnished services to its customers by giving them the technical service of engineers in respect to the use of cement.[9] The witness regarded these services as an important consideration of the price the customer paid for his material.[10] Porter testified that services of a similar nature, but not identical, were rendered to customers by some of the other companies to some of their customers.[11]

3. 30,000 Dealers Overweigh 90 Manufacturers

When the cement Code of Fair Competition was approved by the President, that part of its provision as to marketing in Article XI dealing with the classifications of purchasers was suspended within six weeks and Reiter testified that this was done upon the demand of the dealers. He said:

"There are 90 cement manufacturers in the United States and there are 30,000 dealers. And they had a lot more influence than we did.

[8] (R) Tr. 35756.
See also Lucas, Vice President, Petoskey (R) Tr. 38719.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39290-91.

[9] (R) Tr. 33951.

[10] (R) Tr. 33954.

[11] (R) Tr. 33955-56.

Their original position, which seemed to me to be that they wanted to handle all of the cement sold, gradually was changed, so finally they seemed to be about willing to take or accept a marketing practice as was originally specified by Article XI.

4. Dealer Associations

Coogan testified that dealers had maintained trade associations for more than 25 years, that is, sometime prior to 1915 and that they were active in the late 20's.[1] They had been dwindling prior to the NRA but that organization put new life into them.[2]

During the NRA period they were organized by states and nationally, as organizations of lumber dealers and organizations of material dealers.[3]

In November, 1934, the Dealers' Code Authority asked the Cement Code Authority to appoint a coordination committee to work with its appointees. The chairman of the Cement Code Authority replied:

> "Your letter of November 10 and wire of November 17 making formal request to this Code Authority to appoint a Coordination Committee received the consideration of our Code Authority and Deputy Administrator at a meeting in Chicago yesterday.
>
> The Code Authority did not see its way clear to accede to this request at this time for the following two reasons:
>
> (1) The present Code under which we are operating does not specifically provide for such a committee. An amended Code which we hope to have approved very shortly does provide for the appointment of such a committee and

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 1266-67.

[1] (R) Tr. 23631.

[2] (R) Tr. 23632.

[3] Com. Ex. 1097: List of Officers and Directors of National Retail Lumber Dealers Association.

it is our belief that we should operate under its provisions when approved.

(2) Such a committee when appointed will be empowered to deal with specific matters and there are at this time no specific cases before us for consideration.'']4

a. Direct Purchase of Building Supplies by the Government

In 1935 these organizations were particularly active in opposition to the direct purchase of building materials by the federal relief organizations such as the WPA.1

The National Federation of Builders Supply Associations prepared a brief on the subject and presented it to Mr. Harry Hopkins and another brief to Admiral Peoples.2

On August 28, 1935 MacQueen, secretary of this Association, wrote to Fryer, one of its members, describing their contest with the government over the purchase of building materials in which he said:

[Italicized part quoted in Fdgs. Par. Eighteen (c)]

''There were those who said 'it couldn't be done.' To them it seemed a hopeless task to buck a Department of the Government which was determined to buy direct. However, it has been done and, in my judgment, it is conservative to say that in excess of $50,000,000 of business will be held in dealer channels which, but for your help and that of the others who joined with us, would certainly have gone direct. Not only would we have lost this splendid volume, but buying precedents would also have been established which would have continued to cause severe losses for years to come.

Instead of the disaster which seemed to be certainly headed in our direction, we have been able to gain a

4 Resp. Ex. 3183 Z1: Letter dated 11/19/34.

1 *Supra*, pp. 2385-2403.

2 Com. Ex. 2403: Letter dated 7/16/35, MacQueen to all Secretaries.

signal victory. We have proved to the Government, to manufacturers and to ourselves that we are alive and willing to fight for our rights. More than 10,000 communications went into Washington. I am informed, either directly to members of Congress or to the Procurement Division. Now they should be convinced that a Builders Supply Industry really does exist."[3]

This organization was very active throughout the Code period and concerned itself with an effort to secure the sale of cement through dealers who were recognized as regular dealers and equipped to handle building supplies. Its secretary, MacQueen, writing to members on February 25, 1935, concerning its efforts in respect of the sale of cement, said:

"This letter is being mailed to all Directors of the National Federation and also to several hundred outstanding dealers throughout the United States. Its purpose is to obtain a referendum from leaders of the Industry in order that your officers may determine what the Industry desires.

[Italicized part quoted in Fdgs. Par. Seventeen (e)]

You will find enclosed a typical statement of policy such as is being used by individual cement companies throughout the United States. So far as they have been issued by the cement companies, we believe the statements of policy are identical.

This is not now a Code matter but an Association problem, and the officers of the Federation must ascertain the position which the Industry wishes them to take in regard to this matter.

Will you give this problem your immediate and thoughtful consideration. Before March 4, I would like to have a reply from you, giving the Federation officers your opinion of this announced policy for the distribution of cement and your considered advice

[3] Com. Ex. 2401.

as to what action, if any, should be taken by the Industry."[4]

To this the Building Material Merchants of Chicago District replied, *inter alia*:

> "The statement on Cement Policy represents so much more than has been effective recently in practice that it seems to be almost as much as can be expected. In general the policy, if adhered to in spirit as well as to the letter, is reasonable and acceptable."[5]

Dealers had protested the February 1935 announcement made by the cement manufacturers concerning the classification of business they would sell through dealers, particularly because these announcements did not give any definition of a dealer. They were viewed as permitting the cement companies to regard anybody as a dealer.[6] The later announcements in March and April cured this defect from the dealers' point of view. Then MacQueen issued an undated bulletin "To All Secretaries of Federated Units", as follows:

> "Dealers in builders supplies throughout the country have already received from some manufacturers of cement notice of a revision in their distribution policy. There is reason to believe that, in time, this revised policy will be adopted by the majority of cement manufacturers.
>
> The Executive Committee of the National Federation believes that this revision marks a definite forward step and that the full cooperation of dealers under the terms of this policy should lead to even broader privileges.
>
> It is, moreover, absolutely essential that dealers throughout the United States now prove themselves

[4] Com. Exs. 2393, 2390.

[5] Com. Ex. 2394: Letter dated 3/1/35.

[6] *Supra*, pp. 2322-24.

fully worthy of the privileges accorded them under the terms of this revision. You will readily see that this throws a responsibility of great importance upon all organized groups of dealers. We can not afford to lose the ground which has been gained because of the weakness and instability of a few who may abuse these privileges and thereby destroy benefits very valuable to all dealers.

In the light of this situation, the Executive Committee suggests to the officers of all federated units the following procedure and urges its immediate application.

1. A most important element in this revised distribution policy is the definition of an equipped cement dealer.

2. In order to be able to give to cement manufacturers that protection which we feel it is necessary for dealers to give to them in order to retain our position as the primary channel of distribution, it is essential that both dealers and manufacturers shall know who are equipped cement dealers in all markets.

3. It is suggested, therefore, that a committee of competent dealers be selected immediately in each county or district within your federated unit and that this committee be instructed to prepare a list of all those individuals or firms within their county or district who fairly come within the definition of an 'equipped cement dealer' as defined by cement manufacturers. Careful study should be given to this definition before the preparation of this list is begun.

4. When this list is completed, a member of the committee, or some dealer selected by the committee as being suitable, should present this list *in person* to each manufacturer of cement who sells within that particular market.

5. Upon presentation of this list, the dealer should state substantially as follows:

'The dealers in the market which I represent appreciate the larger privileges accorded to us in the revised distribution policy. We wish and intend to give to manufacturers our fullest cooperation. In order to do this, we must know who will be distributing cement as dealers in our market in order that we may protect both ourselves and all manufacturers who sell there.

'A committee of dealers has carefully prepared this list and believe that it represents the equipped cement dealers in the territory represented by ———— County (or counties). However, we ask that you indicate to us those whom you believe to be equipped cement dealers. If we have included some who, in your judgment, are not equipped dealers, we ask that you strike them from this list. If we have failed to include some whom you believe to be equipped cement dealers, will you add them to this list.'

6. Each committee should then compare all of lists personally submitted to the various cement manufacturers and prepare a master list representing all equipped cement dealers within that market, as determined by all manufacturers of cement distributing therein.

7. This master list should be sent by each committee to the secretary of the federated unit who should compile all of these names for his territory at once and the completed list of equipped cement dealers within the entire area over which he has jurisdiction should be placed in the hands of all cement manufacturers who sell therein or who may make request for such list. When completed, three copies of this list should also be sent to the Secretary of the National Federation.

8. It should be made quite clear to all committees that it is not their function to do other than to prepare a list which, in their judgment, repre-

sents the equipped cement dealers in their territory and then to obtain from all manufacturers such revisions as they deem to be proper. And it should further be made clear that this list is prepared for the sole purpose of enabling right-minded and thoughtful dealers in each market to use their influence to gain rightful protection for all manufacturers of cement and to retain for themselves these privileges which are to them of such value.

9. The Executive Committee believes that if prompt action is taken by all federated units following out this suggestion, great benefits will accrue both to dealers and to manufacturers. If there is delay, all benefits will be lost. We believe that you can render no greater service to dealers in builders supplies at the present time than to follow this suggestion exactly and immediately. Should you need further information with regard to this matter, write or wire at once to the Secretary of the Federation. We earnestly solicit, in behalf of those whom you serve, your hearty response to this opportunity."[7]

Writing on June 19, 1935 to Druecker, President of the Building Material Merchants of Chicago District, MacQueen stated:

> "The splendid service to the industry rendered by the Federation in connection with the sales policy generally announced by cement companies is illustrative of the necessity of the Federation and of its value to all federated groups. Without a doubt, this recently announced cement policy will annually turn not less than $25,000,000.00 worth of business into dealer channels, even at the present low level of sales volume."[8]

[7] Com. Ex. 2392.

[8] Com. Ex. 2398-A.

b. Appoint Liaison Officer for Contact With the Cement Industry

In April, 1935 the National Federation of Builders Supply Associations appointed H. S. Chaffee "for special liaison service" with the cement industry. The letter announcing Chaffee's appointment stated:

> "The Cement Industry is clearly trying to retain the dealer in builders supplies as the primary distributive outlet for their products. Cement manufacturers are endeavoring, apparently, to 'play fair' with the dealers of the United States and, in turn, dealers should accord to their sources of supply an equal measure of fair treatment, bearing in mind that the maintenance of a mark-up on cement which is either too high or too low creates a hardship.
>
> Let us endeavor to work closely with our sources of supply for cement during the coming six months—the results of such cooperation will unquestionably more than justify the effort."[1]

Rader, Vice President of Lehigh, wrote on April 24, 1935 to eleven individuals corresponding roughly with the district trustees of the Institute, as follows:

[Italicized part quoted in Fdgs. Par. Seventeen (f)]

> *"Mr. Harloe S. Chaffee, of Buffalo, New York, has been appointed contact man between the National Federation of Builders Supply Associations and cement manufacturers by the National Federation.*
>
> *You will undoubtedly hear from him from time to time on alleged violations of the Sales Policies by manufacturers, and I hope you will give him any information you can that he asks for, as he is trying very hard to do a constructive piece of work between the dealers throughout the country and the manufacturers. I am sure you will find him fair, open and above board with you. He does not want*

[1] Resp. Ex. 693.

to put any one on the spot but does hope to straighten out as many of the difficulties as he can.''[2]

Scott, Trustee of District 1, Monday of Cumberland and Condon of Hawkeye, each replied that he would be glad to be of assistance to Chaffee.[3] Other replies, if any, are not in the record. Scott testified that he had known Chaffee as a dealer in Buffalo for many years, played golf with him and occasionally sold him a carload of cement, ''and I would be glad to render any service that I could to Mr. Chaffee at any time.''[4] Alexander, President of Missouri, to whom Rader had written, testified that he had heard Chaffee's name but had never met him and could not recall any correspondence with him.[5]

Chaffee wrote Rader again on April 26, 1935 as follows:

> ''Thank you for your letter of April 23rd enclosing map of the United States. It answers the required purpose exactly and will clarify some of the questions I have had in mind regarding special territories.
>
> As per your suggestion, I will contact Mr. Robeson in regard to the Bowe-Bradshaw correspondence.
>
> Your letter of April 24th just came in the noon mail and I am, of course, considerably interested in the page from the Engineering News-Record which you enclosed. We will get on the firing line at once.
>
> I wish to take this opportunity to thank you for the assistance you have given in outlining to some of the other men in your Industry my personal intent in endeavoring to harmonize the relations between the Dealers and the Producers.''[6]

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[2] Com. Ex. 832 G.

[3] Com. Ex. 832 C, D and E.

[4] (R) Tr. 27491.

[5] (R) Tr. 37406.

[6] Com. Ex. 832 F.

On June 3 and 4, 1935, the National Federation of Builders Supply Associations held a meeting of directors in Kansas City, Missouri. The minutes record:

> "The first order of business was the report of the Chairman of the Cement Committee. In view of the fact that the Chairman of this Committee, Mr. H. S. Chaffee, who had rendered invaluable service to the industry in this capacity, was unable to be present, his report was read to the Directors. Mr. Chaffee summarized the various stages of negotiations which had been carried on by the Committee with representatives of the Cement Industry and summarized the dealer interest in the present policy of distribution as announced by a large number of cement companies throughout the United States. At the request of the President, the Secretary of the Federation, L. I. MacQueen, commented upon the present situation as regards cement and emphasized the following points:
>
> First, The responsibility which devolved upon every dealer in builders supplies to ascertain whether or not the cement manufacturer from whom he purchases cement has issued a statement of policy as to distribution. It was pointed out that not all companies had issued such a statement and that there might be difficulty in retaining the advantages which accrue to dealers from this policy if the policy were not uniform as to all manufacturers. It was suggested therefore, that unless the dealer had received notice from his cement manufacturer of the adoption of this policy he immediately communicated with the manufacturer inquiring whether such policy had been issued and if not, why not. Unquestionably dealers should give their patronage to those manufacturers who had indicated in writing their policy of distribution.
>
> Second, Since the announced policy of many cement manufacturers was to distribute through 'equipped cement dealers,' it became a matter of paramount importance to determine who were the equipped cement dealers in every market. Failure to determine

accurately the firms constituting this group would inevitably tend to the breakdown of the entire policy. The speaker outlined a definite program which he recommended to all markets as the procedure to be followed in developing accurate lists of equipped cement dealers.

Third, The speaker pointed out the fact that the announcement of this policy presented a new necessity for stability in every market. A breakdown in one market would unquestionably spread to other markets and would cause the industry to lose all of the advantages for which it had fought and the privileges which had been gained at so great a cost. All markets were urged to maintain as a fixed mark-up the addition of 15¢ per barrel for portland cement f.o.b. cars.

Upon motion duly made and seconded the Directors unanimously approved and accepted this report.

At this point, President Stoner called to the chair Mr. Walter Hagerman of Philadelphia, Vice President of the Federation.

Mr. D. H. MacFarland of the Medusa Portland Cement Company was recognized in the audience and was requested to introduce the next speaker. Mr. MacFarland came forward and expressed his pleasure in being present and most graciously introduced Mr. E. J. Mehren, President of the Portland Cement Association. Mr. Mehren spoke most instructively of the work which was being carried forward by the Portland Cement Association whose function is to develop additional uses and outlets for cement. He discussed the PWA and pointed out the part played by the construction industry in the preparation of this bill. He described the work of the Association through the years of its existence in discovering and promoting new uses for cement thereby increasing the possibility of sale by dealers. He stated that there are now sixteen branch offices of the Cement Association and that they conduct four research and developmental laboratories.

> Mr. Mehren stated that it was the job of the cement association to bring about continuous improvement in the quality of cement and that capable men had been engaged in this work for more than ten years. During this time the association has found or improved nine new uses of cement. He called particular attention to the development of pre-cast joist.'"[7]

In January 1936 Chaffee wrote Rader asking him to attend a dealer association meeting in Cincinnati, where a discussion of dealer mark-up was to take place. Rader planned to attend but did not do so.[8]

c. Regional Associations

During NRA Code period and for a short time thereafter, the National Retail Lumber Dealers Association[1] and regional associations of lumber merchants, who handled cement, were very active in the expression of their wishes.[2]

In August 1935 The Southwestern Lumbermen's Association at Kansas City, Missouri, wrote to Medusa, informing that company that the Kaplan Lumber Co., to whom it was selling at St. Charles, Missouri, was "more of a junk buyer and trader than an accomplished retail lumber dealer"; then described it as a price cutter.[3] Medusa replied:

> "We have advised these people that we do not feel that we are in a position to make shipments to them and believe that this will dispose of this matter."[4]

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[7] Com. Ex. 2399 C-D.

[8] Com. Ex. 933-5 D-5 E.

[1] Com. Ex. 1097: Membership list.

[2] Com. Exs. 1904, 867, 546, 458, 461, 547, 731-6 E-F, 737, 919 B-E.

[3] Com. Ex. 546-2 O-P: Letter dated 8/20/35, Southwestern Lumbermen's Assn. to Medusa.

[4] Com. Ex. 546-2 L: Letter dated 9/11/35, Medusa to Woods, Manager, Southwestern Lumbermen's Assn.

Other associations were also active during this period. Thus, The Carolina Building Material Institute wrote to Bowen, Vice President of Lehigh, on October 28, 1935, stating that after holding an unfavorable conference with two officials of Southern States, a suggestion had been made that a meeting be arranged with Mr. Bowen:

> "The purpose of this meeting would be to discuss with you, in a most friendly and frank manner, why this INSTITUTE [The Carolina Building Material Institute] issues monthly CREDENTIAL OF COOPERATION cards to our Sources of Supply and also why we wish members of the Cement Industry would request and use the CREDENTIAL cards. The Cement Industry is the only one not identified cooperatively with this INSTITUTE."[5]

Bowen replied:

> "In response to your letter of October 28th, I can say that we welcome opportunities to sit down with our customers for discussion of our mutual problems. I will be glad to meet your Committee in Richmond and, since you offer a choice of dates, would suggest Friday, November 8th.
>
> I am sure you will recognize that I am not able to speak for the cement industry as a whole. With respect to the policies and principles of our own company, however, I can assure you that I will try to join you in a frank and open discussion."[6]

On the stand Bowen testified that he attended this meeting and described its business and the outcome as follows:

> "A. This Carolina Institute had adopted a number of marketing policies with respect to cement. It happened that the marketing policy was identical with the policy we had announced in April of 1935.

[5] Resp. Ex. 1114. See also Com. Ex. 933-7 P-Q: Letter dated 10/3/35, Elcock, Southern States to Bowen, Lehigh.

[6] Resp. Ex. 1115: Letter dated 11/1/35.

The organization undertook to issue cards monthly to be furnished to manufacturers on application for use by the manufacturers' salesmen, the cards indicating that the manufacturer was operating on a policy that was acceptable to the Institute."[7]

* * *

"A. The meeting was quite lengthy. The dealers urged me very strongly to have the Lehigh Company apply for cards, and said that they felt confident that these cards would be of great value to our salesmen in their solicitation of business in the Carolinas.

I, in turn, explained to them why we had not applied for cards, and made it clear that we had no intention of doing so.

By Mr. Leisure:

Q. Did you ever take the cards, Mr. Bowen? A. We never did.

Q. Why not? A. Because we had adopted our own policy earlier in 1935, did not want to tie our hands as to our ability to make any changes in that policy if we chose to, nor did we want to establish any precedent that might have been established by acceding to the wishes of the Carolina dealers which might have embarrassed us in dealing with similar requests from other territories where we might have considered the purposes of the organization a great deal more objectionable."[8]

Elcock of Southern States describes the Carolina Building Material Institute's card system as a "racket."[9]

Warner, Vice President and Sales Manager of Colorado; one of the Ideal Group, responding to a demand received from the Mountain States Lumber Dealers Association, wrote, on June 8, 1934, to Grier, President of that Association, and after referring to his letter of the previous day, stated:

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[7] (R) Tr. 26759.

[8] (R) Tr. 26761-62.

"It, of course, reopens a subject which has been of widespread and continuing interest to ourselves as well as to the dealers in the inter-mountain territory for some time. There is a very wide difference of opinion in the several districts as to what constitutes reasonable and fair protection on the several different classes of cement sales. There is also the question of how much the traffic will bear in view of the price and activity in competing lines.

We hope that all of this can be made the subject of a discussion between a committee representing the dealers and one representing the cement manufacturers in this territory at an early date.

Assuring you of our continued interest in your views and in the desire of the dealers generally to preserve their position, and hoping that we may expect similar consideration from yourselves, we are * * *."[10]

McGovern, Sales Manager of Hermitage, responding to a request by the Alabama Lumber & Building Material Association, for dealer protection on a particular job, wrote on August 15, 1934:

"We will be very glad indeed to protect the dealers on the Mobile Custom House job, bids to be opened on August 28th.

We are always willing and glad to work through the building material dealers wherever possible."[11]

Alpha, responding to a demand by the Illinois Lumber & Material Dealers Association, Inc., made upon Alpha in September, and again in October, 1934 wrote:

"We are perfectly willing to stand on our record of dealer co-operation in the State of Illinois as it has been created during the many years we have shipped Alpha Cement to dealers in this State. I think, Mr. Bryan, you know as well as any man in

[10] Com. Ex. 581 F.

[11] Com. Ex. 547 F.

the State how far our company has gone in protecting local dealers on the sale of our product, and can readily recall instances wherein our policy of dealer co-operation was demonstrated with a considerable resulting loss of business to our company.

Within the limitations of any code article governing our marketing policies that may be approved by the Government for our industry, we expect to continue our dealer co-operation, and in the event we are requested to make direct quotations on jobs which your association feels should be sold by a local dealer, we are very willing to discuss the matter with you or the local dealer or dealers involved, before any direct quotation is made.

You will understand that we are being called upon for an expression regarding our sales policy from so many different organizations, such as State organizations, County organizations, City organizations, etc. that it has been difficult for us to set up a policy which will be entirely satisfactory to everyone, as the demands of these organizations differ very materially.

The best plan we have been able to develop is the one referred to above. In practically every case we have found an attitude of fairness on the part of the dealers, as our own friends have not wanted to see us eliminated from the possibility of securing orders when they realize a situation has developed which is entirely beyond our control."[12]

Following the demise of NRA the National Federation of Building Supply Associations appears to have lost a substantial part of its support. The letters of MacQueen, its secretary, indicate defection and "lack of funds" in the summer and fall of 1935.[13]

Sometime in 1936 MacQueen appears in operation of the MacQueen Service in Pittsburgh, and in that employ-

[12] Com. Ex. 867-7 X: Letter dated 11/1/34.

[13] Com. Ex. 2400: Letter dated 8/9/35 to all Federation Secretaries. Com. Ex. 2406: Letter dated 9/18/35 to all Federation Secretaries.

ment he wrote to Alpha on November 24, 1936 and, after expressing high esteem for its dealer policies took the company to task for selling a concern in Cleveland which did not comply with the definition of a dealer as set forth in Alpha's own policy statement. The letter said:

> "Simply and solely because of the injury which this situation was doing to your Company and because of the loss of tonnage which it was causing you, not only in Cleveland, but elsewhere, it seemed to me that if this situation could be called to your attention, as it has been, only good would result, both for your Company and for those who still handle your product, as well as others who would like to do so but feel unable because of competitive conditions which have been created by such accounts as the one under discussion in Cleveland.
>
> . . . .
>
> I do not need to tell you, of course, that nothing is further from my mind than to suggest or intimate in any way to whom you should or should not sell. That is entirely outside of my interest or concern. However, when your Company issues a public statement in which they define a dealer in exact terms, it becomes a matter of importance to my clients, who look to me for information and advice, as to whether your Company does maintain in actuality the letter and spirit of the policy which it publishes."[14]

Coogan for Alpha replied to this on January 25, 1937:

> "I have been holding on my desk your letter of November 24th in the hope that I would get in Pittsburgh or some place where I could contact you.
>
> I think the most satisfactory way of reaching a perfect understanding on this question would be by personal interview rather than an attempt to handle it by correspondence.

[14] Com. Ex. 867-7 U.

I am simply dropping you this line to let you know that the matter is still in my mind and at the first opportunity I will contact you.'"[15]

There are other instances in which dealers or dealer associations wrote to manufacturers for the purpose of complaining that their sales were not in conformity with their own declared sales policy.[16]

d. Dealer Rosters

Dealers and dealer associations have prepared and distributed lists of dealers regarded as properly equipped to handle cement.[1] These were sent to manufacturers:[2]

West Penn made frequent inquiries of dealer associations as to dealers and lists of dealers.[3]

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[15] Com. Ex. 867-7 S.

[16] Com. Ex. 1164 A, C: Letters dated 5/25/36 and 7/25/36 from Illinois Lbr. & Material Dealers Assn. to Spring, Sales Manager, Lone Star.

[1] Com. Ex. 2395: Letter dated 4/25/35, Building Material Merchants of Chicago District to James Wiggston, Jr.
Com. Ex. 2396: Letter dated 4/29/35, Wm. E. Dee Material Co. to Fryer, Building Material Merchants of Chicago District.
Com. Ex. 2399: Minutes of Meeting, 6/3-4/35, National Federation of Builders Supply Associations.
Com. Ex. 867-7 B-C: Letters dated 11/18/35 and 11/15/35 between Alpha and Southwestern Lumbermen's Association.
Com. Ex. 2406 A-C: Letter dated 9/18/35, MacQueen to Secretaries of Federated Associations.

[2] Com. Ex. 819-2 A: Letter dated 3/28/35, Medusa to Illinois Lumber and Material Dealers Association.
Com. Ex. 2392 A-C: Letter dated 4/19/34, MacQueen to Secretaries of Federated Units.
Coogan, Vice-President, Alpha (R) Tr. 24733.
Warner, Sales Manager, Colorado (C) Tr. 13921.

[3] Com. Ex. 549 F, G, M-N, P-Q, T.

McKee, Vice President of West Penn, wrote the Building Material Dealers Association of Eastern Pennsylvania on August 4, 1943:

> "Would you kindly advise as to whether Mr. Roy H. Benjamin of Conyngham, Pa., is a recognized building supply dealer and also whether he is cooperating with the other building supply dealers in his neighborhood."[4]

And again on August 16, he wrote the same Association:

> "Could you kindly send us the latest list of recognized dealers in your territory, invoicing us for same if necessary, and oblige?"[5]

This company also made inquiry of dealer associations in order to ascertain the standing of dealers. In March 1933 West Penn wrote to the New York State Builders' Supply Association:

> "We have received an inquiry from Mr. Vincent Pardi, 427 Pleasant Street, Schenectady, N. Y., for wholesale price of cement, evidently indicating that this man is trying to become a dealer.
>
> We presume from the nature of the inquiry that he is not entitled to dealer requirements but will be glad to have your definite advice on this and oblige."[6]

And in April 1934 West Penn wrote the Building Supply Dealers Association of Pennsylvania:

> "Thank you for your letter of April 23rd regarding status of Mr. Lindenmuth in that he is a member of the Mahanoy Valley Lumber Association. We assume therefore that he may be quoted on cement as a building supply dealer."[7]

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[4] Com. Ex. 549 I.

[5] Com. Ex. 549 G.

[6] Com. Ex. 549 o.

[7] Com. Ex. 549-3 E.

McKee, in explaining why his company made inquiry of dealer associations and why they were able to give him information which he might not otherwise have before him for consideration, testified:

> "A. We tried to select our dealers as carefully as we do our salesmen, because they represent us. The transaction is not a matter of a single sale, but we hope will be a continuing relation over many years in which they will promote our product. We naturally, as we would in employing a man, or beginning a relationship with him, try to get all possible information about him.
>
> Dun and Bradstreet will tell us about his credit standing, but, of equal importance to us, is whether the man has the warehouse facilities, the delivery equipment to be a satisfactory outlet for us, whether his building supply business is his principal business, or whether he had just hung up his shingle and is only temporarily desiring to purchase cement, and is not in it to promote the continued sale of our product in that territory.
>
> There is considerable difficulty about getting this information. If we inquire of another dealer in the town involved he may be biased. By writing an association, or, if it is an official, we may be able to get a more unbiased opinion. We cannot depend altogether on the salesman's reports because salesmen in their anxiety to get an order may be overoptimistic as to the possibilities, or the abilities of the dealer in question.
>
> • • •
>
> A. The reason we use the term 'recognized' or 'legitimate', is that the man is recognized by the general public, or other dealers, as being in that business, and that he is legitimately in the business, and not somebody who hangs up a sign and says, 'I am a dealer.' If we were asking about a lawyer, we would write to a bar association or guild——"[8]

[8] (R) Tr. 27757-58.

In an inter-office memorandum Boice, the Sales Manager of Universal Atlas in Waco, wrote:

> "Customarily, before we open a new dealer, we like to talk to at least a number of the best recognized dealers in the town to find their reaction as to whether or not the proposed concern is a recognized dealer in cement.
>
> You might look into this matter and see whether or not we would be getting ourselves in bad by selling these people and if not, talk with them further and see what can be done."[9]

Koch, Vice President of Lone Star, testified that he had never seen a list of dealers and did not know that such lists were provided. He had undoubtedly at some time inquired of a dealers association whether a dealer prospect was regarded as a regular dealer or not.[10]

Neylan, Assistant General Sales Manager of Lone Star, examined as to the influence of dealer associations in determining dealers who would or would not be dealt with, testified:

> "Q. Did you put in any of your circulars in 1935 a provision recognizing the definition of a legitimate dealer, which the dealers advocated? A. I don't recall that, Mr. Wooden. We have tried to define a dealer as long as I have been in the business, and I have heard them argue about that going back to 1900.
>
> Q. Sometimes your idea of what was a legitimate dealer in a particular instance, would that be in conflict with what the retail associations thought? A. Absolutely. We decide our own dealers, regardless of associations.
>
> Q. Did you have dealer associations provide you with lists of dealers that they considered the legitimate dealers? A. I know of one or two instances where they tried to, but know also of those instances where we would not take it.
>
> Q. You mean you would not even accept the list itself? A. We refused to let our men recognize even

[9] Com. Ex. 1937: Memorandum dated 7/3/37.

[10] (R) Tr. 33244-45.

any discussion concerning it. Our position has been that our definition of a dealer, whom we recognize as a dealer, is strictly our own. We don't care what the associations think about it, or what our competitors think about it.'"[11]

Warner, Sales Manager of Colorado, testified that he may have inquired of the Mountain States Lumber Dealers Association as to the standing of certain dealers but that he reached his opinion independently of any opinion received from them.[12]

Other company representatives testified that they had never made inquiries of dealer associations.[13]

e. Florida Dealers Boycott

On February 21, 1935 while NRA was still in effect the Florida Building Material Institute sent the following telegram to Coogan, Vice President of Alpha:

"Florida Building Material Institute Executive Committee has just concluded two days conference with manufacturers comma wholesalers and jobbers lumber and building materials with most satisfactory results in effort to solve distribution problems of mutual concern stop it was conclusion of committee and cement industry representatives who spoke unofficially today that best interests of all will be served by early conference between committee and officially authorized spokesmen of cement concerns serving Florida stop you are cordially invited and urged to have such officer your company attend cement distribution conference in Jacksonville Mayflower Hotel ten oclock am on Friday March first stop letter confirmation and further information will follow."[1]

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[11] (C) Tr. 6482-83.

[12] (C) Tr. 13920-21.

[13] Brobston, President, Hercules (R) Tr. 26434.
Elliott, Vice President, Whitehall (R) Tr. 28555.

[1] Resp. Ex. 698.

Presumably, similar telegrams were sent to other manufacturers.

The telegram was followed by a letter signed by counsel for the Florida Building Material Institute.[2] To these Alpha replied on February 26th:

> "Letter received will not discuss Florida situation with Institute counsel or competitors glad to meet our dealer customers individually or in groups regarding Alpha policies if Friday meeting is arranged on this basis will attend wire reply."[3]

Apparently, the manufacturers did not respond to the demands of this association and a boycott resulted. Bowen, Vice President of Lehigh, explaining why the 1935 sales policy of Lehigh was not extended to Florida until 1937, testified:

> "A. Because at that time there was a dealer organization operating in Florida which had made certain requests on us for pledges of cooperation with their activities which we considered were illegal and wouldn't give those pledges.
>
> As a result, we were being considerably penalized by the loss of business from the dealers connected with this organization and the only way we could protect ourselves was to sell cement to anyone we could. We didn't want to tie our hands as against this sort of treatment by committing ourselves to any definitely stated policy in the State of Florida, and did not extend the policy to that State."[4]

This association went out of business by the end of 1937 and Lehigh issued a sales policy for Florida territory similar to its policy in other states.[5]

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[2] Resp. Ex. 695.

[3] Resp. Ex. 697.

[4] (R) Tr. 26749.

[5] Resp. Ex. 1113: Dated 12/13/37.
(R) Tr. 26751.

5. Manufacturers' Attitude Concerning Dealer Associations

Company representatives testified that their companies did not refuse to sell or discontinued selling a dealer because he was not recognized by dealers associations.[1]

Most of the companies pay no attention whatsoever to demands made upon them by dealers associations.[2]

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[1] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36484.
Georgia, Tr. 48101 (adopting Tr. 37217).
Oregon, Tr. 48102-03 (adopting Tr. 37217).
Giant, Tr. 48103-04 (adopting Tr. 37217).
Utah, Tr. 48105 (adopting Tr. 37217).
Standard, Tr. 48105-06 (adopting Tr. 37217).
Vulcanite, Tr. 48106-07 (adopting Tr. 37217).
Manley, General Manager, Hawkeye (R) Tr. 41631.
Brooke, Vice President, Monarch (R) Tr. 42332.
Moore, R. W., Vice President, Dewey (R) Tr. 46900.
Brobston, President, Hercules (R) Tr. 26063.
Elliott, Vice President, Whitehall (R) Tr. 28557-58.
Warren, G. E., Vice President, Southwestern (R) Tr. 29071-72.
Hanahan, President, Volunteer (R) Tr. 38640.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6482-83.
Koch, Vice President, Lone Star (R) Tr. 32840.
McKee, Vice President, West Penn (R) Tr. 27908.
McGovern, Sales Manager, Hermitage (R) Tr. 36240.
Alexander, President, Missouri (R) Tr. 37215.

[2] Elliott, *supra*, Tr. 28557-58.
Bates, J. E., Sales Manager, Federal (R) Tr. 30672-75.
Koch, *supra*, Tr. 32839-40.
McGovern, *supra*, Tr. 36214-15.
Alexander, *supra*, Tr. 37216-17.
Elcock, Vice President, Southern States (R) Tr. 37529-31.
Letzkus, Sales Manager, Pittsburgh Plate Glass (R) Tr. 37935.
Dannelly, Vice President, National (R) Tr. 39548-49.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39857-58.

However, they do give consideration to complaints made by their own dealers and take time to discuss these matters with them in many cases.[3]

6. Influence of Dealers on Uniformity of Company Practices at the Level of Greatest Advantage to the Dealers

Throughout the evidence relating to the final cost and conditions upon which dealers may obtain cement, whether the subject under discussion had to do with prices, discounts, conditions of sale,[1] announcements to the trade or classification of trade, there is evidence of intent by each manufacturer, selling in any given area, to offer his dealers as much advantage in buying from him as the dealer could possibly secure in buying from any other manufacturer in the same competitive area. This intent by each manufacturer rose from the same motive, namely, to get and keep dealers who preferred to handle his brand and it resulted in similarity of practices and of terms and conditions of sale to dealers at the level of greatest advantage to the dealer. Time and again the company representatives testified that they had to meet any change in conditions of sale favorable to the dealer by conforming thereto.

Ackerman, Vice President of Lawrence, testified:

> "Q. Has it been your experience that you have offered anything to a dealer that is not offered by your competitors, with the exception of the brand? A. Well, I offered a lot of our dealers a lower price one time, but shortly afterwards my competitors followed suit. I extended terms one time, but they followed suit. I wish I could think of something

[3] Coogan, Vice President, Alpha (R) Tr. 23628.
Brobston, President, Hercules (R) Tr. 26063-64.
Horner, President, Kosmos (R) Tr. 36962-63.
Dannelly, Vice President, National (R) Tr. 39551.
Koch, Vice President, Lone Star (R) Tr. 32840.

[1] See Part XV.

that I could do that they won't match me with that will enable me to get the business.'"[2]

While discussing the five-day retroactive price clause accompanying announcements of immediate price advances, Ackerman said:

"Q. What would be the effect if you changed the practice and substituted either no period at all or a two-day period instead of your present five-day period while your competitors adhered to the five-day period? A. I would lose my customers."[3]

Referring to Lawrence's April, 1935 policy announcement, Ackerman testified:

"Q. Did you put out your circular of April 9th, Exhibit 270-J, with any knowledge that other cement manufacturers were putting out similar circulars? A. My recollection, Mr. Wooden, is that one fine morning we learned that one of our principal competitors had issued a statement very similar to that one.

Q. Who was that? A. I do not recall who it was now.

Q. Was it Lehigh? A. I do not recall. I honestly do not recall.

Q. Then what did you do? A. I thought it was a pretty clear exposition of policy, and rather than be at a disadvantage, I hastened to issue a similar one."[4]

Coogan, Vice President of Alpha, testified:

"Q. Isn't it feasible to offset one unfavorable element with your customer by having another element that is favorable, or do you conceive that all elements must be the same by various competitors? A. No, I only speak for our own customers, and our

[2] (R) Tr. 31323-24.

[3] (R) Tr. 31267-68.

[4] (C) Tr. 7360.

own company; and I don't think our competitors would allow us to have an advantage in any market. I think they would soon meet that competition.'"[5]

Sweeney, Vice President of Edison, testified:

"Q. Yes, in determining dealer policies you have two principal factors to consider; namely, dealer demands and competitors' policies,—isn't that true, Mr. Sweeney? A. That is very true because we must be competitive if we want to stay in the business. We have to take cognizance of every action on the part of competition.

Q. So, whatever your dealers might say to you would not necessarily determine your policy,—you have to be guided as well by what your competitors will do? A. Not altogether, no. There may be times when we have gone along with dealers on policies of our own without considering any group of dealers—or manufacturers, or any individual manufacturer.'"[6]

W. R. Blair, Sales Manager of Southwestern (El Paso), explaining the circumstances under which the company sent policy announcements to the Texas dealers in July, 1935, testified:

"A. We had picked up in the field a policy put out by one of our competitors, which was much more advantageous to the dealers than the one under which we had been operating, and we felt it necessary to meet that immediately in order to protect our dealer position.'"[7]

Of similar import is the explanation offered by nearly every manufacturer of its February and April policy announcements in 1935 following the original announcement by Lehigh.[8]

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[5] (R) Tr. 24710.

[6] (R) Tr. 35842.

[7] (R) Tr. 38980.

[8] *Supra*, pp. 2320-22, 2328.

Brooke, Vice President of Monarch, in respect to inquiry as to whether his company sent out policy announcements in 1935, testified:

> "A. I think we did.
>
> Q. An identical one with the one that you found in the field? A. It is my recollection that there was some demand on the part of our dealer-customers to announce our policy inasmuch as several of our competitors had sent out printed announcements, and we felt that we were forced to meet that situation. While it was not so very different from the practice that we were following, we did it to appease the dealers who were asking us to.
>
> Q. In other words, you sent out an identical announcement or an identical policy to those you found? A. It was similar. I am not sure it was identical."[9]

J. E. Bates, Sales Manager of Federal, testifying as to the circumstances that induced publication of his company's February, 1935 announcement to dealers, testified:

> "A. On this particular announcement, I think my memory is right on this, a dealer, a very good friend of mine in Buffalo, immediately upon receipt of the policy from a competing company, called me up, and I jumped in my car and was over in that dealer's office within probably 10 minutes to look that policy over, and that's the result of it."[10]

Again as to Federal's policy in respect to sales for Federal relief work, referring to a competitor's policy announcement, Bates testified:

> "Q. Was that received in the regular course of business? A. Right, from one of our men.
>
> Q. And under what circumstances? A. Well, our representative called on dealers down in the Fred-

[9] (R) Tr. 42415.

[10] (R) Tr. 30691-92.

onia-Dunkirk area, and was informed that various dealers in Stock County were going to boycott Federal Portland Cement Company for selling CWA job direct in their particular town or in the town of Dunkirk.

Q. Did they ever boycott you? A. I do not think anything ever—I do not recall whether they did or not. I do not believe they did, because we are selling in those towns to this day, and we never ceased selling in those towns.

Q. How do you sell WPA business now, Mr. Bates? A. Through a dealer."[11]

And further testifying as to importance of immediately giving the dealer the same advantage given him by competitors, Bates testified:

"Q. With the announcement of the February policy by you, and your competitors, you were all on an identical basis, so far as your treatment of dealers was concerned? A. Well, we were, as far as our competitors were concerned; yes, sir.

Q. Then you changed your policy again in April, 1935? A. Yes, a restatement.

Q. Do you know of any competitors of yours who did not change in accordance with the change that you made? A. No, I don't, I can't say that I did. I do know that our most important competitor issued that restatement of policy, and we were very quick to give the dealers that same policy."[12]

G. E. Warren, Vice President, Southwestern, Ohio, testifying as to the reason for issuing the company's April, 1935 policy announcement, said:

"I wanted to match other announcements that had been made more favorable to dealers."[13]

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[11] (R) Tr. 30702.

[12] (R) Tr. 30816-17.

[13] (R) Tr. 29097.

As to the corporation's terms of discount and their uniformity with that of competitors, Warren testified:

> "Q. Do you know whether or not your terms of discount are generally uniform with those of your competitors in your market area? A. I think they are; yes, sir.
>
> Q. Would you tell us why you make yours the same as your competitors? A. Well, I do not want competitors to claim an advantage of having better, more liberal terms of payment than we have.
>
> Q. Well, why don't you make a more liberal term than they have? A. Well, they are very liberal now, very generous. That discount is a very high percent. It will run six or seven percent, and I think it is high enough."[14]

Robeson, Vice President of Nazareth, testifying on uniformity of terms of discount, said:

> "Q. Can you quote any different terms of discount than your competitors,—or what is the situation? A. No, sir. In our relationship with our customers, the cement market is such a sensitive one from a selling standpoint——"[15]

Again as to his company's policy announcement and the reason why it followed in substance that of his competitor, Lehigh, Robeson testified:

> "A. Well, the only thing I can say, your Honor, is that we were without a definite policy. Our customers were asking us for this, that, and the other thing, and the Lehigh Company made an announcement of a policy, and the dealers were responding very favorably to it, and immediately asked us whether or not we would give them the same sort of protection. We had the dealer good will—customer good will—involved, and, in so far as we saw the dealers' response was favorable, why, yes, we immediately wanted to

[14] (R) Tr. 29143-44.

[15] (R) Tr. 28205.

> get what good will we could, and we told the dealers 'yes,' why, we would give them exactly the same protection that the Lehigh Company had offered them."[16]

B. A. MacDonald, Vice President of Northwestern States, testifying as to the reason for its policy announcement in 1935, explained:

> "A. Our dealers had been endeavoring to get us to put out an announcement of policy for many years, and we hesitated in putting one out, but when all of our competitors came out with an announcement of policy we felt that that would have a competitive effect on our dealers, and we thought that if that was acceptable to our dealers we had better follow suit to help us in competing for business."[17]

Koch, of Lone Star, testified as to the influence of the dealers in compelling his company to continue a practice which at the time was popular with them and which it endeavored to abandon. Koch said:

> "When Lone Star Cement Corporation discontinued the trade discount, other manufacturers did not follow it in making the change. The dealers demanded that the trade discount be restored, and as a result, in order to satisfy the dealers, the trade discount was restored about a month after it was abolished."[18]

Coogan, Vice President of Alpha, referring to an effort to change quotations of cement in cloth and paper to paper only, testified:

> "A. I explained previously that at one time we started quoting one in paper, thinking that that would be acceptable to our customers. Most of our com-

[16] (R) Tr. 28251.

[17] (R) Tr. 36532.

[18] (R) Tr. 33148.

petitors continued quoting both in cloth and paper and eventually, in order to please our customers, we did go back to the same force of quoting.

• • •

This indicates very clearly while there is no difference in substance that it is absolutely necessary for our company to make it this way and to make known in some detail these facts, to meet in competition that which our competitors have placed upon their quotations, and therefore we did so.

In other words, and maybe I did not explain it very clearly there, this does indicate very clearly that while there may be no difference in substance, it is a different way of stating it, that it was absolutely necessary for our company to meet any quotations in the same detail as our competitors, and thus meet the competition which we were faced with from our other competitors."[19]

Bowen, Vice President of Lehigh, testifying as to the uniformity in terms of payment offered to dealers, said:

"A. As far as I know, they are, at the present time, the same. Every change in discount terms' conditions that has taken place since 1915 has either offered the dealer a larger discount or a greater period of discount time, so it has been necessary, as these changes have been made, to meet each one of them as it arose, or else do what we did in August, 1926; endeavor to offset discount terms, that were apparently more attractive to the buyer, by a price reduction."[20]

As to the uniformity of allowance on the return of cloth sacks, Hartley, Sales Manager of South Dakota, the nonrespondent, State owned plant, testified:

"Q. And do you find that your competitors do the same thing? A. So far as I know, they all do; that is, on cloth sacks.

[19] (R) Tr. 23424-28.

[20] (R) Tr. 26706-07.

Q. In other words, you are more or less forced to pay the return on the bags, and your competitors do, if you want to sell; is that correct? A. Yes, sir."[21]

F. B. Warren, Vice President of Bessemer, testifying on the policy of selling relief work through dealers, said:

"A. I think if we were quoting the Government direct on business, that the dealers could handle better, it would serve to weaken the dealers, weaken our relationship with them.

Q. Whether your competitors do it or not? Is that your testimony? A. Well, the fact that competitors did it, if we followed competitors into a practice, we would get less criticism—we would get much less criticism than if we started the thing.

Q. You think you would lose dealers if your competitors did it, but you would not lose as many if you did it and your competitors also did it; is that correct?

• • •

I think that if we followed competitors into a practice, if we were forced by their activities into a practice which we can deal with, it would entail less resentment from our dealers than it would if we led the way into such a practice."[22]

Letzkus, Sales Manager of Pittsburgh, refers to the importance of preserving dealer good will and granting him terms that will permit him to compete with other dealers in his territory.

"The importance of the dealer has had a tremendous influence on Pittsburgh's marketing methods and policies. Pittsburgh is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's good will, and giving him a price and

[21] (C) Tr. 12766.

[22] (R) Tr. 32578-79.

terms that will enable him to compete with other dealers selling in the same consuming area."[23]

McGovern, Sales Manager of Hermitage, testified that after finding an announcement in Nashville issued by Signal Mountain saying that that company would prepay freight on shipments to the dealer, his company adopted the same policy 10 to 12 days later because "We have to meet favorable conditions that our competitors put out, and that was a help to the dealer."[24]

McGovern testified that his company adopted the Lehigh plan but, "* * * we got so many requests from dealers to discontinue it, that we followed their request and did discontinue."[25]

As to the development of the practices of Hermitage prior to the NRA Code, McGovern said:

"A. Well, of course our practices come about over a period of a good many years, and they have come about as our competitors have changed their policies, more favorable to our customers, why, we have had, of course, to meet those conditions or forego the business."[26]

Alexander, President of Missouri, examined as to terms and conditions of sale, testified:

"Q. Didn't you tell me yesterday afternoon that your terms and conditions of sale had been substantially the same as that of competitors? A. I told

[23] (R) Tr. 37707.
To the same effect, Nelson, Vice President, Wolverine (R) Tr. 35916.
Lucas, H. H., Vice President, Petoskey (R) Tr. 38754.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39857.

[24] (R) Tr. 36172.

[25] (R) Tr. 36200.

[26] (R) Tr. 36191.

you our terms and conditions of sale had been substantially the same since 1931, and that I presumed that our competitors would have to offer as favorable terms as ours, or lose business.'"[27]

Elcock, Vice President of Southern States, testifying on the same subject, said:

"Q. I am talking about policies now and marketing conditions in your terms of sale. Can you name anyone that is different from your competitors?

• • •

A. What do you mean? Ever change the terms and conditions?

By Mr. MacIntyre:

Q. At any other time than your competitors change them. A. Yes, I do.

Q. Cite me an instance where you have. A. My goodness, Mr. MacIntyre. I do not believe there is a company in the business that has not gone easy on its terms and conditions.

Q. Can you cite me any time where you have published terms and conditions and prices different from those published by your competitors? A. No, sir. We publish just as little as we can.

Q. You do not know of any where your published terms and conditions are different from your competitors? A. No."[28]

And again,

"Q. From your experience, will you tell us what is the effect on your company, if you quote a price lower to one dealer than you do to other dealers at the same point? A. Other dealers find out about it, they toss you out the window right then and there, they are through."[29]

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[27] (R) Tr. 37422.

[28] (R) Tr. 37659-60.

[29] (R) Tr. 37515.

Manley, General Manager of Hawkeye, examined upon the same point, testified:

> "Q. Mr. Manley, do you know that any term or condition under which you sell cement is different from a corresponding term or condition of any competitor? A. We have in the same manner tried to meet the terms of other companies, because we feel we could not expect to sell any cement if we did not have as good a term as another company.
>
> Q. Your answer is no—— A. No.
>
> Q. —with that explanation."[30]

J. L. Nelson, Vice President of Wolverine, discussing the tendency toward uniformity of terms of sale and discount, stated:

> "From my past experience in the cement industry I have found that the terms of sale and discount quoted by the various companies tended to be uniform. At one time the cash discount was on a percentage basis. Subsequently this became 1 cent a barrel, 2 cents a barrel, 5 cents a barrel and finally 10 cents a barrel. Each one of these changes resulted in more favorable terms to the customer and in each case the competitors of the company responsible for the change were forced to adopt it in order to maintain their position in the trade.
>
> Wolverine has always made its terms at least as favorable as any granted by its competitors because we could not compete as long as we were offering terms which were less advantageous than those offered by other manufacturers. Whenever competitors started giving terms which were more favorable than Wolverine's it had to adopt the change. Our reason for not granting more liberal terms is that we believe that competitors would meet such terms and we wouldn't gain any advantage by granting them."[31]

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[30] (R) Tr. 41908.

[31] (R) Tr. 35918.

To the same effect is the testimony of Horner, President of Kosmos,[32] Letzkus, Sales Manager of Pittsburgh Plate Glass,[33] Lucas, Vice President of Petoskey,[34] and Dawson, Vice President of Medusa.[35]

Dannelly, then Sales Manager of National, expressed the matter directly and simply to the Georgia Retail Lumber & Building Supply Association in a letter of April 25, 1935 in response to an inquiry from that Association, as follows:

> "'We appreciate very much your letter of April 24th. We attach hereto our sales policy issued on February 23rd.
>
> There has recently been issued by several cement companies a sales policy, copies of which have been sent to this office by our salesmen. This company has not issued a sales policy since February 23rd as we, frankly, are still trying to interpret all phases of our competitors' policies. This is no reflection on such policies but it is probably a reflection on our intelligence.
>
> However, in the meantime, we are guiding our endeavors along the lines of the sales policies of our competing companies as we want to try to be constructive in our efforts in behalf of our dealer friends.
>
> We will be glad to try to get a copy of our new sales policy to you when such is issued.'"[36]

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[32] (R). Tr. 36820-21.

[33] (R) Tr. 37709.

[34] (R) Tr. 38756.

[35] (R) Tr. 40064.

[36] Resp. Ex. 3038.

PART XV

TERMS AND CONDITIONS OF SALE.

A. Introduction.

Evidence as to terms and conditions of sale actually in use by the manufacturers appear in the record in the copies of quotations and contracts for sale actually issued by the manufacturers and in various forms employed by them. Such terms and conditions of sale and limitations upon the nature of sales have been the subject of discussion between manufacturers in order to discover conditions and methods generally regarded as fair practice and to condemn practices regarded as unfair methods of competition and harmful to the industry as a whole. The results of these discussions appear in the minutes of the American Association of Portland Cement Manufacturers and of the Cement Manufacturers Protective Association, and occasionally in the minutes of the Portland Cement Association. They also appear in the Code of Ethics and the Compendium of the Institute, and in the NRA Cement Code. Thus, the minutes of the Portland Cement Association at their meeting of September 15-16, 1915 record:

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

["*The report of the Committee on Trade Conditions was here presented, read and—after discussion—the recommendations approved, but since the Committee were authorized to prepare a special booklet containing their report, the same is not included as part of these minutes.*"][1]

The report of the committee, when published, in the introduction thereto, said:

["The report of the Sub-committee of the Committee on Trade Conditions was presented to the

[1] Com. Ex. 3236 Z 85.

entire Committee on September 13th, to the Executive Committee on September 14th, and to the Association on September 15th and 16th. Each paragraph was thoroughly discussed and with several changes was passed by the members present. The report in its present form contains all changes approved by the members.

The report has been referred to counsel and has received their approval.

Since the May meeting the Trade Conditions Committee has undertaken a careful investigation and study of the conditions surrounding and affecting the sale and delivery of cement, in an effort to reach a conclusion as to what constitutes the best practice in each material and important particular, so as to be able to recommend definite practices which will most satisfactorily fit conditions, protect and serve the interests of the manufacturer, and at the same time operate in perfect fairness to the cement user and dealer.

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

The magnitude and importance of the cement industry demand that the sale and distribution of the product be conducted upon firm and definitely fixed principles, and that doubt and uncertainty be eliminated.

It appears that the importance of this attitude is being more fully appreciated by the cement manufacturers, and that the membership is desirous of a full and free discussion of the various subjects involved in order that the consensus of opinion may be ascertained and established as custom, and so recognized by all cement manufacturers.

Uniform observance of the best practices will promptly eliminate many abuses and irregularities now prevalent."][2]

The scope of the matters considered by this Committee are indicated in the index to this pamphlet.

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[2] Com. Ex. 3193, p. 1.

There is no evidence that, since the termination of the NRA Code, there has been any agreement among the manufacturers to adhere to any specific terms or conditions of sale, and company representatives testified that they are entirely free to make such terms and conditions as they deem best in the interest of their respective companies.[3]

For convenience in the outline of this subject, terms and conditions which generally prevail in contracts actually entered into for the sale of cement are discussed below in one group, and recommendations and admonitions relating to fair and wise business practice are discussed in a subsequent group.

The influence of dealers in compelling uniformity of dealing at the level of greatest advantage to the dealers is set forth in Part XIV, Section G 6, pp. 2546-58.

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[3] Alpha: Coogan, Vice President (R) Tr. 23467-68, 24885-86.
Edison: Sweeney, Vice President (R) Tr. 35784.
Hercules: Brobston, President (R) Tr. 26527-29.
Hermitage: McGovern, Sales Manager (R) Tr. 36334-35.
Lehigh: Bowen, Vice President (R) Tr. 26821, 26930-31.
Lone Star: Hogan, President (R) Tr. 34560.
Missouri: Alexander, President (R) Tr. 37286.
National: Dannelly, Vice President (R) Tr. 39510.
Nazareth: Robeson, Vice President (R) Tr. 28208.
North American: Porter, President (R) Tr. 33921-22.
Northwestern Portland: Hollister, President (R) Tr. 48120.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36612.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37844.
Southwestern: Blair, W. R., Sales Manager (El Paso), (R) Tr. 39240.
Superior Portland: Tongue, Secretary (R) Tr. 42902.
West Penn: McKee, Vice President (R) Tr. 27870.

B. Contract Terms.

1. Statement of Price, Quantity and Time and Place of Delivery

a. Statement of Term

A definite statement as to the price of the cement to be purchased and the quantity and time and place of its delivery appeared in most sales contracts.[1]

b. Documentary References

The specific sales contract and order forms appended to the Compendium and to the NRA Code provided for a statement of the above terms, except that the specific sales order forms provided that the price should be the "prevailing market price at time of shipment."[1] Recommendations for definite statements as to these matters appeared in the text of the Compendium,[2] [NRA Code,][3] and in the Code of Ethics.[4]

The revised NRA Code approved May 11, 1935 provided:

[Italicized part quoted in Fdgs. Par. Seven (p)]

["*All future sales orders and future sales contracts for the sale of products of the industry shall contain a definite statement of price, quantities, terms of payment, time and place of delivery, and*

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[1] Com. Ex. 561, p. 21: Forms attached to the Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

Com. Ex. 557, p. 349: Forms attached to the NRA Code of Fair Competition, dated November 27, 1933.

[1] Id., Com. Ex. 561, p. 18, Com. Ex. 557, p. 346.

[2] Com. Ex. 561, p. 14: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[3] Com. Ex. 557, p. 342: NRA Code of Fair Competition, dated November 27, 1933.

[4] Com. Ex. 138 P: Code of Ethics dated 1929.

all other terms of sale necessary to form a complete and unambiguous contract."][5]

c. Comments of Witnesses

Although Government proposals for cement bids often provided for specific quantities to be bid upon, the Government has sometimes specified all cement that may be required for a project without stating quantity.[1]

Brobston, President of Hercules, testified that manufacturers did not usually quote unless they knew the approximate amount of cement the contract requires. They only quote for indefinite amounts in cases where a dealer is attempting to get a contract so that if the dealer gets it, his manufacturer will supply the cement. In such cases there may be five or six dealers competing for the contract and there is no assurance that a certain dealer will get it.[2]

Brobston testified that his company refused to bid to the Government, where acceptance of the bid would require storage of a large quantity of cement without assurance that it would be taken.[3]

Evidence as to failure to bid where quantity and place of delivery were not specified appears in Part IV E 7.

2. Specifications

a. Statement of Term

Cement was warranted to conform to the standard specifications of the American Society for Testing Materials, the American Standards Association and/or the Federal Specifications Board. The seller did not guarantee

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[5] Com. Ex. 560, p. 21.

[1] Peoples, United States Director of Procurement (C) Tr. 10411-20.

[2] (C) Tr. 10565-66.

[3] (C) Tr. 10585-94; Resp. Ex. 46: Letter 4/14/38, Brobston, President, Hercules to Procurement Division, Treasury Dept.

finished work because he had no control over the use of cement.

b. Documentary References

Provisions similar to this appear in the specific sales contract and order forms appended to the Compendium[1] and to [the NRA Code][2] and appeared in the Code of Ethics[3] and in [the pamphlets of the P.C.A.[4] and of the A.A.P.C.M.][5]

c. Comments of Witnesses

Evidence as to the origin, development and reasons for the use of this term of sale is shown in Part I, Section A, Subsections 1, 2 and 3, page 20 *et seq.*, and reference is made to that evidence.

3. Price Decline Clause

a. Statement of Term

Shipments made under a specific sales contract were invoiced at the current destination price of the seller on the date of shipment, if this current price was below the contract price.

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[1] Com. Ex. 561, pp. 20, 23: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, pp. 347-48, 350-51: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 Q-P: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, pp. 16-17: Trade Practices in the Cement Industry published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, p. 5: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

b. Documentary References

Provisions to this effect appeared in the specific sales contract forms attached to the Compendium[1] and to [the NRA Code.][2] No recommendation of this nature appeared in the text of the Compendium, although a similar provision appeared in [the text of the NRA Code.] The Code of Ethics[3] did not mention a price decline clause, but [the recommendations of the P.C.A[4] and of the A.A.P.C.M.[5] opposed the practice of protecting the buyers upon a decline in the current price.]

[The price decline clause in the specific job contract form appended to the Code guaranteed the purchaser as to either all or any specified part of the total requirements for constructing the specific work described in the contract.][6]

c. Comment of Witnesses

Evidence as to decline clauses in state invitations is shown in Part IV, Section A 3 b, p. 713 *et seq.* and reference is here made to that evidence.

Alpha used a price decline clause for the first time in its specific job quotation form put in use November 8, 1920. The reason for insertion of this clause was that the company found some of its competitors guaranteeing against decline and also found that some competitors, who didn't

[1] Com. Ex. 561, p. 21: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 349: NRA Code of Fair Competition, dated Nov. 27, 1933.

[3] Com. Ex. 138 N-U: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, p. 16: Trade Practices in the Cement Industry, dated January, 1919, published by the Portland Cement Association.

[5] Com. Ex. 3193, p. 16: Report of the Committee on Trade Conditions, dated 1915, published by the Association of American Portland Cement Manufacturers.

[6] Reiter, Chairman, Cement Code Auth. (C) Tr. 16748-49.

carry that provision, were nevertheless extending the benefit of a decline on specific job contracts. Parties with whom Alpha had specific job contracts would "step out and buy from our competitors at the lower price and just let our contract hang up in the air," if Alpha didn't give them the benefit of a price decline.[1]

Edison in 1918 would not guarantee prices against decline because it felt that a contract against a decline in price had all the advantage on one side and was, therefore, unfair.[2]

Hawkeye in 1931 protected its customers against any decline in prices, giving customers the benefit of lower prices found to be quoted even 8 days after the cement had been shipped and billed.[3]

Lone Star of Indiana in its "Trade Ethics and Marketing Policies" stated that in the event of a decline in price, quotations would be made effective on the date of issue, and the reduction authorized would apply on all shipments in transit that had not yet reached destination.[4]

The Navy Department in May, 1932 obtained bids for cement at thirteen destinations from Alpha, Calaveras, California, Coplay, Cowell, Edison, Florida, John M. Friend, Inc., General Builders and Supply Corp., Hercules, Keystone, Lawrence, Lone Star of Alabama, Medusa, Monolith, Pacific, Riverside, Southwestern, and Yosemite, which did not offer the Navy Department the protection of a decline clause. Lone Star of New York, Lone Star of Pennsylvania, Lone Star of Virginia, North American, Uni-

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[1] Resp. Ex. 552: Alpha's specific job quotation form dated November 8, 1920.
Coogan, Vice President, Alpha (R) Tr. 23395.

[2] Resp. Ex. 2567 K: Pamphlet of general instructions to Edison salesmen dated Jan. 5, 1918.

[3] Resp. Ex. 3400 A-O: Series of papers from the files of Hawkeye showing price quotations in 1931.

[4] Com. Ex. 1112: Trade Ethics and Marketing Policies issued by Lone Star of Indiana in 1929.

versal Atlas and Vulcanite did include a price decline clause on these bids.[5]

The Navy Department obtained bids for a project at Pensacola, Florida on April 16, 1931 from Lone Star[6] and Lehigh,[7] both of which included price decline clauses.

Additional comment by witnesses upon this term of sale appears in Part XI, Section B 1, pp. 1878-83 and B 7, pp. 2921-26.

4. Cash Discount

a. Statement of Term

This discount, frequently 10¢ per barrel, was deductible from the invoice price if paid in full within a certain number of days from the date of issue. Invoices not discounted generally were payable 30 days from date of issue.

b. Documentary References

A discount of 10¢ per barrel for cash within 15 days from the date of invoice was provided in the specific sales contract and order forms attached to the Compendium and [to the NRA Code.] Recommendations to the same effect appeared in the texts of the Compendium, [NRA Code,] and in the [recommendations of the P.C.A. and of the A.A.P.C.M.][1]

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[5] Com. Ex. 1099 B: Abstract of bids received by Navy Department for 13 destinations on May 17, 1932.
White, Examiner, Economic Staff, F.T.C. (C) Tr. 16523-24, 16543-44.

[6] White, *supra*, Tr. 16455.

[7] Id., Tr. 16474-75.

[1] Com. Ex. 561, p. 14: Compendium of Established Terms and Marketing Methods, dated Dec. 9, 1935.
Com. Ex. 557, p. 342: NRA Code of Fair Competition, dated Nov. 27, 1933 and contract and order forms attached thereto.
Com. Ex. 3192, p. 4: Trade Practices in the Cement Industry, pub. in January, 1919, by the Portland Cement Association.
Com. Ex. 3193, pp. 3-4: Report of the Committee on Trade Conditions, pub. in 1915 by the Association of American Portland Cement Manufacturers.

Minutes of the Association of American Portland Cement Manufacturers at their meeting in September, 1905, disclosed discussion of an agreement as to discount terms theretofore entered. The minutes record:

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

["*Mr. Harding (Bonneville): I should like to know how many companies are really living up to the agreement with reference to discounts to be made on and after September 1st? We all signed the report in good faith, but I understand that some companies are still making quotations covering 2 per cent off in ten days, good until the end of the year.*

After considerable discussion on this question the report of the Committee on Trade Conditions was read by the Secretary."][1]

At their meeting in December, a report was read in the following terms:

["AGREEMENT TO STANDARDIZE THE CUSTOMS AND USAGES IN THE CEMENT TRADE.

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

'WHEREAS, *We, the Undersigned, Manufacturers of American Portland Cement, desire to standardize the customs and usages in the cement trade for the purpose of making all our business transactions more easy, simple, safe and economical;*

'THEREFORE, *We agree as follows:*

* * *

'*Concerning terms of payment: In all cases payment within thirty (30) days after date of shipment from the works to be insisted upon. A one (1) per cent discount for each to be allowed for payment within ten (10) days from date of invoice. Invoices to be stamped 'Positively no discount on this bill after .....'. No discount to be allowed*

[1] Com. Ex. 3235 Z 3.

on freight and sacks under any conditions. This change to take effect September 1, 1905.

'Concerning bags, the following recommendations are made: Bags positively to be paid for with the cement. Discount in no case to be allowed on bags or freight. Count and inspection at mill always to govern. Freight on bags to be prepaid by customers.

'It is expressly understood that we do not agree in any way to fix the price or restrict the production; or in any way to restrain or restrict competition in the cement business.

'We, the undersigned, agree to be bound by the recommendations above recited and to live up to the same for a period of one year from this date, unless we formally withdraw from the same in writing.' "][1]

The Cement Institute received complaints that some of its members were accepting notes in payment of invoices and allowing a cash discount when the notes were tendered; also that some members were allowing a cash discount after the date called for by the invoice. The Institute notified its members that these practices were in violation of Article 4 (Secret Rebates) and Article 2 (Standardization of Sales Contracts) of the Institute's Code of Ethics.[4]

[The Code Authority, in order "to preserve competition in the sale of cement and to eliminate discrimination", established a standard term under the NRA Code of cash discount of 10¢ per barrel for payment in full within 15 days of date of invoice. The Code Authority originated and advanced an exception to this term to the effect that where purchases involved frequent shipments, a plan of semi-monthly remittance based on a 15-day average, might

[1] Com. Ex. 3235 Z 6, Z 7.

[4] Com. Ex. 1041 A-C: General letters of the Institute, dated March 24, 1930 and September 11, 1930, *supra*, Part X B 2, pp. 1844-45.

be used. "Frequent shipments" meant a regular series of shipments of at least one carload per week to the same customer.][5]

[The Code Authority interpreted the Cement Code as prohibiting any averaging of discounts. Each invoice was to be handled as a separate transaction, and it was not proper to average the discount period for two or more invoices paid with one remittance, nor to accept a check in payment of one invoice at a discount after the discount period on the condition that the next invoice be discounted a like number of days before expiration of its discount period.][6]

[The Code Authority had complaints filed with it because of the failure to stipulate the day from which the discount was to be determined.][7]

[The Code Authority notified Marquette that a complaint had been filed with it charging a violation of Article 12, section 4, pars. B, C, and D of the Code in that Marquette had advised a customer that if the customer would pay cash for a certain order, Marquette would allow a cash discount on a previous order as to which the discount period had already elapsed.][8]

c. Comments of Witnesses

Evidence as to the history and use of dealer discounts, differentials, and the protection of dealer mark ups, ap-

[5] Resp. Ex. 3119: Explanation 14 B issued by the Code Authority, April 13, 1934.

[6] Com. Ex. 1039 A: Code Authority Interpretation No. 56, dated January 30, 1934.

[7] Com. Ex. 840 D-E: Letter dated 4/20/34, Universal Atlas to Code Authority.

[8] Com. Ex. 1038 C: Letter dated April 20, 1934 from Reiter, Chairman, Cement Code Authority, to Wecker, President, Marquette.

pears in Part XIV, Section E, pp. 2433-99, and reference is here made to that evidence.

Alpha discovered that Lawrence had sent out notices to the trade that after August 1, 1926, its terms would be 10¢ per barrel discount for cash within 30 days of the date of invoice. Without determining how to meet this competition, Alpha advised its sales department that "If you are offered business provided we meet those terms, you are authorized to accept it."[1]

Alpha, Lone Star, Lehigh and National in bidding on one letting provided that their cash discounts were to run from the date of invoice, whereas Florida allowed the discount from the date of delivery, as called for by the invitation.[2]

Edison offered a cash discount of 5¢ per barrel in 10 days on June 1, 1920. On July 15, 1920, the company changed this to 10¢ per barrel in 10 days. On August 18, 1926, it was again changed to 10¢ per barrel in 15 days. During and after the code period Edison permitted a cash discount on a semi-monthly basis.[3]

Colorado sent a circular letter to dealers on August 20, 1926, announcing that effective that date the company was changing its cash discount period from 10 days to 15 days. This was done to make a more advantageous arrangement for the dealers.[4]

VARIATIONS IN COMPETITIVE BIDS.

Coplay, in a bid to the Brooklyn Navy Yard, stated that the discount was to run from the date of delivery. In the

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[1] Resp. Ex. 622: Interoffice memo dated Aug. 4, 1926 from Sweitzer, General Sales Manager, Alpha to Sales Department.

[2] White, Examiner on Economic Staff, F.T.C. (C) Tr. 16475-76.

[3] Resp. Ex. 2603: Memorandum showing discount terms of Edison from 1920 to 1940.

[4] Resp. Ex. 2979: Letter by Warren, Sales Manager of Colorado to Santa Fe Builders Supply Co. 8/20/26.

case of other manufacturers bidding this discount was quoted from the date of shipment.[5]

Edison quoted 10¢ within 15 days of shipment on a letting of the Navy Department of May 17, 1932. Florida and Hercules both quoted 10¢ within 15 days of delivery. The Hudson Supply Company quoted 5¢ within 10 days from delivery, and the J. M. Friend Company quoted 10¢ within 10 days from delivery.[6]

Florida and Hercules on one bid quoted at all destinations prices subject to 10¢ discount for payment in 15 days from date of delivery. Some of their competitors quoted on the basis of 10¢ discount, 15 days from date of shipment. Lone Star of Pennsylvania and Lone Star of Virginia allowed only 30 days for the acceptance, while most companies bidding allowed 60 days. White of the Economic Staff of the F.T.C. testified that if there was a difference of several days in this connection, it might be a consideration to the buyer.[7]

Hawkeye's General Manager testified:

> "Q. I want to ask you, Mr. Manley, has there been any change in the terms of discount of the Hawkeye Company. A. Yes.
>
> Q. I will ask you, if you recall, what those changes were? A. When I first came with the company it was 5 cents per barrel discount for payment of invoice in 10 days, and there was another change; it went to 10 cents per barrel in 10 days, and at the present time it is 10 cents a barrel in 15 days.
>
> Q. How did the Hawkeye Company, if you know, come to make those changes in its terms. A. It found that competitors were making those terms, so it was necessary to be on an equal basis with them.
>
> Q. What do you mean by 'necessary'? A. We could not expect to give our customers, or not to, our

[5] White, Examiner on Economic Staff, F.T.C. (C) Tr. 16463.

[6] Id., Tr. 16531-34.

[7] Id., Tr. 16465-66.

customers, better terms than any of our competitors.

Q. Or as good? A. Or as good.'"[8]

South Dakota's Sales Manager testified:

"Q. What are your terms of discount, Mr. Hartley? A. Ten cents a barrel, 15 days.

* * *

Q. Has that always been the same; I mean were they your original terms of discount? A. No, sir. The original terms were 10 cents 10 days.

Q. Why did you change, Mr. Hartley? A. Our competitors changed, and we followed.'"[9]

Lehigh on one occasion offered the Louisiana State Highway Commission a "state discount" of 5¢ per barrel and a 10¢ per barrel cash discount, after Lehigh's bid had already been submitted to the State Highway Commission.[10]

From 1905 to 1914 Lone Star offered a cash discount of 2¢ per barrel for payment within ten days from the date of invoice; from 1914 to 1920 it became 5¢, and then went up to 10¢ per barrel.[11]

Lone Star announced in 1929 that it would allow a cash discount of 10¢ per barrel for payment of invoices in full within 15 days from date of issue, where there was no past due unpaid account. This was offered because large purchases involving delayed shipments would inconvenience the customer if daily remittance were required.[12]

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[8] Manley, General Manager, Hawkeye (R) Tr. 41818-19.

[9] Hartley, Sales Manager, South Dakota (R) Tr. 41518.

[10] Resp. Ex. 1310: Letter dated March 3, 1931 from Houser, District Manager, Lehigh, to Beasley, Purchasing Agent, Louisiana State Highway Commission.

[11] Koch, Vice President, Lone Star (R) Tr. 33147.

[12] Resp. Ex. 21: Lone Star of Indiana booklet of 1929 entitled Trade Ethics and Market Policies.

Brooke, Vice President of Monarch, after stating that its published terms were 10¢ per barrel, 15 days, 30 days net, testified:

> "Q. And do I understand you do not adhere to them at all times? A. We vary from them."[13]

Penn-Dixie figured on the date of shipment, rather than on the date of arrival of a carload of cement in order that the Katonah Lumber, Feed and Fuel Company might benefit by its cash discount reduction.[14]

Phillips, a Dealer, has found that the cash discount amounts to 10¢ per barrel for payment 15 days from date of invoice. There are no other discounts.[15]

Southwestern's price list of January 30, 1935, stated that a cash discount of 10¢ per barrel would be given if payment in full was made within 15 days from date of issue. A supplemental price list of Southwestern of July 24, 1935 changed the cash discount to 10¢ per barrel for payment of the invoices in full by the 10th of the following month. Southwestern's price list of October 21, 1935 again changed this to 20¢ per barrel for payment of invoices in full within 15 days from the date of issue. The April 1, 1936 California price list of Southwestern changed this to 20¢ per barrel for payment by the 10th of the following month.[16] However, Southwestern's discount in 1937 at the El Paso mill was 10 cents per barrel for payment within 15 days of

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[13] Brooke, Vice President, Monarch (R) Tr. 42309.

[14] Dain, Dealer (C) Tr. 7971; Com. Ex. 1183 A-B: Letter dated Oct. 5, 1936 from Long, Dist. Sales Mgr., Penn-Dixie to Katonah Lumber Coal & Feed Co.

[15] Phillips, Dealer, (C) Tr. 8379.

[16] Com. Exs. 1283-1286: Price lists of Southwestern.

date of shipment, or 30 days net, while in Arizona the company's discount was 20 cents per barrel if payment was received on or before the 10th of the month following the date of shipment. El Paso's terms of sale and discount have been different in Arizona from those in Texas and New Mexico because different competitive conditions were met in Arizona. Generally speaking, the company tried to avoid exceptions in its terms of sale, but sometimes the government prevailed upon it to make the discount apply to the fifteen days after arrival of the cement, rather than to the fifteen days from the date of shipment. In addition, El Paso would probably accommodate a dependable customer who met adversity.[17]

Universal Atlas permitted no cash discount prior to January 21, 1909, when the company offered a cash discount of one cent per barrel for payment within 10 days, 30 days net. The company increased its cash discount on January 15, 1914 to 2¢, to 5¢ on November 15, 1915, and to 10¢ on February 11, 1921. On August 18, 1926, this term of sale of Universal Atlas was changed to 10 cents per barrel for cash within 15 days. Thereafter this discount was continued.[18]

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[17] Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 38961-62.

[18] Resp. Ex. 2484: Memo showing terms offered by Universal Atlas to customers.

McKee, Vice President of West Penn, testified:

"Q. Now, as to terms of sale and discount, what are your terms of sale and cash discount? A. Ten cents per barrel discount in 15 days, 30 days net.

In the case of customers who are regularly buying a number of cars per week, for the purpose of convenience, we permit them to discount twice a month, averaging the invoices to a 15-day average.

Q. And how long has that been the practice of your company? A. That has been our practice ever since we began operations in the cement business, and a similar practice of 10 cents per ton, 15 days was our practice in the stone and sand business at the time the cement company began to operate."[19]

5. Package Charges and Allowances

a. Statement of Term

When shipped in cloth, the price included the buyer's deposit or leasing charge for the sacks. The buyers agreed to return sacks within 90 days, freight collect, to the seller's nearest mill. The seller agreed to pay 10¢ for each sack returned in good condition. When shipped in paper the selling charge for paper sacks, which were not returnable, was included in the price.

b. Documentary References

The specific sales contract and order forms attached to the Compendium [and to the NRA Code] carried provisions giving effect to the above conditions, and recommendations of like effect appeared in the texts of the Compendium,[1]

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[19] (R) Tr. 27750-51.

[1] Com. Ex. 561, pp. 14, 17-19, 22: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[NRA Code],[2] Code of Ethics,[3] and in [trade practice reports of the P.C.A.,[4] and of the A.A.P.C.M.].[5]

[The Association of American Portland Cement Manufacturers at a meeting in December, 1905, unanimously adopted the report of the Bag Committee, which read:

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

"I respectfully report, on behalf of the Committee on Bags, that I have communicated with all members of our Association, and have received written replies, in which they express their opinion relative to the charge which should be made for cotton sacks, and also the price of their repurchase, and find that a large majority of the companies are in favor of uniform action. From this information I respectfully report as follows: 'That all cotton sacks be charged at the rate of 10 cents each, and be included in the price of cement, and when the cotton sacks, having the label of the respective manufacturers, are returned in good condition, freight prepaid, that each company repurchase the cotton sacks at 7½ cents each.' "][6]

[At the meeting of the Association in March, 1906, the following minutes appeared:

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[2] Com. Ex. 557, pp. 343, 346, 350: NRA Code of Fair Competition dated November 27, 1933.

[3] Cf. Com. Ex. 138 S: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, p. 18: Trade Practices in the Cement Industry, dated January, 1919, published by the Portland Cement Association.

[5] Com. Ex. 3193, p. 11: Report of the Committee on Trade Conditions, dated 1915, published by the Association of American Portland Cement Manufacturers.

[6] Com. Ex. 3235 Z 8, Z 9: Minutes of the Meeting of the Association of American Portland Cement Manufacturers, December, 1905.

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

"The reason the Association did not act upon Mr. Gerstell's motion (i.e. that the Association agree to charge 15 cents per barrel for cement in paper) was—some of the members were of the impression that if we should issue another agreement which would necessitate each member sending out a number of circulars, it would cause much comment among the dealers about the so-called 'Cement Trust.'"[7]

[At a meeting in April, 1908 of the same Association, the question of bag returns was again before the meeting, and a proposal was made to reject all returned bags which had been wet. The minutes record:

"The President: The reason for putting that in is this: we want to take away everything possible that is an implement in the hands of the manufacturers toward cutting prices. This is a question which involves the cutting of prices just as much as the actual reduction in price. For instance: you may reject a number of bags sent you from your customers; another mill may come around and tell the customer: 'Here! I'll take every bag you send back as being good'; which is a cut in price just as much as if he had reduced it 5¢ a barrel, and, unfortunately, we happen to know where that is being done today. It is always done on a bad market, to give away a lot of money in the price, and then give away more in the return of the empty bags. It would seem that some manufacturers cannot give away enough. These resolutions are designed for the executive officers. Matters so obvious to us, unfortunately, are not obvious to a great number of executive officers, who have not the time to spend on details. They are not to be criticized; because they have not seen what we are able to see; which is obvious, because they employ us to look after the details and that is what this association is for, primarily—an association of sales managers. We as sales managers do not attempt to dictate to our

[7] Com. Ex. 3235 Z 11.

presidents. We do not attempt to formulate the policies of our companies—we suggest to our president and to our executive officers; that is what we are trying to do now—to make suggestions, and while these suggestions may seem very simple to us as sales managers, they are not simple to a number of presidents who are not following what we are now recommending.

* * *

Mr. Kendall: This bag proposition: I think I understood at our last meeting in New York that that bag proposition was settled to charge out the bags when sent away; and, when returned, to be credited at 10¢ apiece, for every bag in good order.

(Voices: '7½.')

And this bag proposition I think had better go just as Mr. Affleck said in Chicago at our meeting—that they should be 10¢ out and 10¢ in. * * *"][3]

c. Comments of Witnesses

[The Code Authority found, in respect to information as to cloth sack returns, that credit for cloth sack returns may be used as a secret rebate or discrimination between customers.[1] If a company correctly reported its cloth sacks statistics to the Code Authority, the element of secrecy was eliminated.[2] The Code Authority could tell from statistics whether any secret rebate had been given in the form of sack returns merely on the statement of the company reporting that so many sacks had been returned and so many had been credited to the various customers.[3] If one company reported that it allowed 100% of the sacks returned to it, that was evidence that the company had made too

[3] Com. Ex. 3235 Z 24, Z 25.

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 16814.

[2] Id., Tr. 17119.

[3] Id., Tr. 17120.

great an allowance, because the experience in the industry has been that sacks returned in good condition are materially less than 100%.][4]

Alpha's package charges and allowances were changed on August 28, 1926 because the railroads had made a change in handling the freight on empty bags returned. Prior to August 28th the cement company reimbursed the customer for freight paid on empty returned bags. After August 28th the railroads changed their rules and allowed the bags to come back with freight charges collect; whereas their rules previously had insisted on prepayment.[5]

Subsequently Alpha allowed empty cloth sacks to be returned with freight charges collect. Coogan testified:

> "A. Well, our company, prior to the use of these quotation forms to which you have just referred, namely Respondent's Exhibit No. 565, always insisted that the freight on the bags be paid by the customer but about that time, we found that some of our competitors in soliciting business nearby their mills used as a sales argument the lesser amount of freight required to be paid in order to return bags to their mill, as compared to the rate of returning bags to the more distant mill.
>
> After that had been practiced by some of our competitors for some time, we just put into effect this at our St. Louis mill, the fact that we would refund to the customers the charges which he had prepaid on the bags.[6]
>
> • • •
>
> Q. Do you say that there has never been a time when there was any agreement or understanding concerning the allowances put on returned bags? A. I do."[7]

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[4] Reiter, Chairman, Cement Code Authority (C) Tr. 17122.

[5] Coogan, Vice President, Alpha (R) Tr. 23409.

[6] Id., Tr. 23406.

[7] Id., Tr. 24885-88.

Prior to October 30, 1935, Alpha had quoted for both paper and cotton sacks, but inasmuch as most of its customers were then buying cement in paper, Alpha decided to quote them only in paper packages and make its reductions for differential for bulk shipments.[8] Most of Alpha's competitors continued to quote both cloth and paper and eventually, in order to please its customers, Alpha went back to its original form of quoting.[9] Alpha found it absolutely necessary to make this change to meet the terms which Alpha's competitors had placed on their quotations.[10]

At one time Coplay sold the bags and then bought them back at 10¢ each. Later Coplay put in a system of leasing the bags to the buyer, with a deposit, which the buyer made at the time of payment. That deposit was returned to the buyer when he sent the bags back.[11]

Dewey first initiated the practice of furnishing in the car galvanized annealed wire cut to proper lengths for bundling sacks for their return.[12]

Edison, in 1918, announced that it would repurchase cloth sacks bearing an Edison brand at 10¢ each within 60 days from the date of shipment, only when the sacks were in serviceable condition. Edison would not pay freight on the returned cloth sacks. As to foreign bags, Edison would credit customers' accounts with 5¢ for each such sack received. Edison encouraged the return of bags because of the abnormal price of cotton. In one announcement it was stated that Edison's investment in cloth sacks was tremendous and that as collateral at the bank, this investment was practically worthless.[13]

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[8] Coogan, Vice President, Alpha (R) Tr. 23422.

[9] Id., Tr. 23424.

[10] Id., Tr. 23427-28.

[11] Twamley, Vice President, Coplay (C) Tr. 6772.

[12] Resp. Ex. 3629 A-B: Dewey pamphlet entitled Dewey Doings of October 1, 1915.

[13] Resp. Ex. 2567 O: Pamphlet of general instructions to Edison salesmen dated Jan. 5, 1918.

Edison announced, in January, 1932, that cloth bags were leased to the purchaser at 10¢ each, to be included in the delivered price. The purchaser agreed, within 90 days of the delivery of cement, to deliver to Edison freight collect, the cloth bags bearing the Edison brand, and Edison agreed to refund to the purchaser 10¢ for each such bag returned in serviceable condition. No payment would be given for foreign bags. Paper bags were to be charged at the rate of 15¢ per barrel, without redemption value.[14]

Hawkeye at one time was selling and repurchasing sacks at 15¢, and at another time the figure was 25¢.[15] About 1935 Hawkeye began leasing sacks to customers instead of selling and then repurchasing them.[16]

In its 1935 forms Huron referred to the charge imposed for cloth sacks as a leasing charge and also made the condition that sacks be returned within 90 days from date of shipment. The price for cement in non-returnable paper bags included the cost of the bags.[17] Huron's order blank form printed in May, 1936 altered the form to provide that if Huron changed its existing charge for the lease of cloth sacks, the purchase price named in the order should be changed accordingly.[18]

Lone Star advanced the price on sacks about 1925 to 15¢ instead of 10¢. Other companies did not follow at that time and Lone Star had to recede because dealers complained that Lone Star's price was too high and they would not buy. At the present time the company's sack allowance is not different from that of other companies.[19] Lone

[14] Resp. Ex. 2566 Y: Edison Sales Code dated January 23, 1932.

[15] Manley, General Manager, Hawkeye (R) Tr. 41819.

[16] Id., Tr. 41821.

[17] Resp. Ex. 2394 D: Dealer quotation forms of Huron.

[18] Resp. Ex. 2394 Z39-Z52: Huron Order blank forms used from 1928 to November 23, 1937.

[19] Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6031-32, 6612-13.

Star in 1929 announced that shipments would be made in cloth or paper sacks or in bulk at the option of the purchaser. Sacks would be charged for at the prevailing price of 10¢ each for cloth sacks and 15¢ per barrel for paper sacks. The company stated: "These charges may be changed from time to time because of fluctuation in the price of packages purchased." Cloth sacks bearing "Lone Star" brand were to be returned to the mill, freight collect, in which case a refund or credit at the outgoing price was allowed to the purchaser. Lone Star, however, would not accept sacks of foreign brands.[20]

Lone Star price, at its Nazareth mill on one occasion was $2.05 in cloth. On this price the differential was 25¢ less for paper. In other words there was a 15¢ charge for paper.[21] These differentials were in effect for 7 or 8 years. Generally they were the same for other companies, but there were times when these differentials were not the same.[22]

Louisville has found that charges for packages have varied from time to time, and so the company set an arbitrary figure of 15¢ per barrel for paper and 40¢ for cloth.[23]

South Dakota pays the freight when bags are returnd. All of South Dakota's competitors do the same thing when cloth sacks are returned. In other words, South Dakota is forced, more or less, to pay the return on the bags, as do its competitors, if the Company wants to sell.[24] The bags belong to the State plant, and it has been the practice to pay the return freight on them for about twelve years.[25]

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[20] Resp. Ex. 21: Lone Star of Indiana booklet of 1929 entitled Trade Ethics and Marketing Policies.

[21] Neylan, Assistant General Sales Manager, Lone Star (C) Tr. 6027-28.

[22] Id., Tr. 6028-29.

[23] Com. Ex. 971-5 D-E: Letter dated April 16, 1935 from Gray of Louisville to Dr. Burns.

[24] Hartley, Sales Manager, South Dakota (C) Tr. 12765-66.

[25] Id., Tr. 12778.

The price quoted for cement in cloth is 25¢ per barrel higher than in paper, subject to repurchase at 10¢ if the bag is returned in good condition.

Hartley, South Dakota's Sales Manager, testified:

> "Q. Now, how did you arrive at this particular figure which you have used as the differential? A. It was the figure used by competitors in their price circulars.
>
> Q. Do you ever make any shipments of cement in bulk? A. Yes, sir.
>
> Q. And what is the difference on that? A. Forty-five cents per barrel.
>
> Q. Has it always been 45 cents per barrel? A. I think not.
>
> Q. What was it? A. I think at one time it was 40 cents a barrel.
>
> Q. Why did you change? A. Competitors changed their circular prices. We changed ours to conform.
>
> Q. And how did you arrive at the first figure—I mean at 45 or whichever was first, 40? A. The same way, through quotations by competition.
>
> Q. Do you feel free, Mr. Hartley, to change your differential for cement in paper sacks and from cement in bulk whenever you choose—I mean, you would be free to do that if you thought it was to the best advantage of your company? A. Yes, sir."[26]

Southwestern's sales manager in March, 1929, wrote all Southwestern salesmen enclosing copies of a Riverside price list and asking them to note the portions he had underlined, particularly noting that salesmen should not agree to prepay or absorb any charges on the return of sacks on paving work, because "The observance of this feature in your solicitation of paving business will automatically tend to throw more paving business through the dealer." The Riverside price list enclosed provided that

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[26] Hartley, Sales Manager, South Dakota (R) Tr. 41512-13.

returned sacks were repurchased at 10¢ per sack with the customer prepaying the freight.[27]

Southwestern's sales manager in August, 1929, wrote Warner that he certainly would appreciate it if Warner would discontinue the practice which he had apparently instituted of absorbing return freight on empty sacks from Arizona points and said he would like to hear from Warner on this matter.[28]

Southwestern provided, in an announcement in May, 1934, that cloth sacks bearing its brand remain the property of the company. The buyer agreed to return the cloth sacks bundled and marked, so as to secure complete identification to the mill within 90 days from the date of shipment of the cement. The company agreed to refund a deposit of 10¢ for each cloth sack so returned. This 10¢ deposit was included in the price. It was agreed that the cloth sacks had to be delivered to the mill in a good condition subject to the company's count and inspection and that no refund would be made for cloth sacks not marked with Southwestern's brand. The company agreed to pay the carrier's freight charge for the return of empty sacks. It was also provided that if Southwestern changed its deposit required for cloth sacks, the gross price specified would be changed in accordance with the change of the deposit required. Paper bags were included in the price when cement was so packed, and such bags were not returnable.[29]

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[27] Com. Ex. 1205 K-L: Bulletin to all Southwestern salesmen, dated March 1, 1929 from Partridge, Sales Manager, Southwestern.

[28] Com. Ex. 1205 P: Letter dated August 10, 1929 from Partridge, Sales Manager, Southwestern to Warner, Sales Manager, Colorado.

[29] Resp. Ex. 3750: Price list of Southwestern for Arizona, effective May 2, 1934.

Volunteer changed its dealer contract form on October 8, 1933 to provide that title to cloth bags remain in the seller instead of the seller agreeing to repurchase them.[30]

6. Delivery Within 15 Days or Future Delivery Beyond 15 Days

a. Statement of Term

Industry products are sold either on current or on market orders for delivery within 15 days, or on orders or contracts for future delivery beyond 15 days. Quotations on current orders are for immediate acceptance, and orders for delivery within 15 days are subject to shipment on the 15th day. Orders or contracts for future delivery beyond 15 days are accepted to cover either period requirements or specific work.[1]

b. Documentary References

Recommendations to this effect appeared in the Compendium and [in the NRA Code], but did not appear in the Code of Ethics.[1] [Somewhat different recommendations appeared in the pamphlets of the P.C.A.[2] and in the A.A.P.C.M.,[3] in that those Associations advised that trade

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[30] Resp. Ex. 2276: Dealer contract form used by Volunteer, dated September 8, 1933.

[1] Com. Ex. 561, p. 13: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.
Com. Ex. 557, p. 340: NRA Code of Fair Competition, dated November 27, 1933.

[1] Com. Ex. 138 N-U: Code of Ethics dated 1929.

[2] Com. Ex. 3192, pp. 11-12: Trade Practices in the Cement Industry, published in January, 1919 by the Portland Cement Association.

[3] Com. Ex. 3193, p. 3: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

quotations should be made for only one carload for immediate acceptance and shipment within 15 days.]

c. Comments of Witnesses

Alpha, in 1916, used a 30 day quotation, but in view of the conditions of the market and the difficulties in manufacturing, it became advisable to limit its quotations so not to have on its books potential applications for large quantities of cement. Therefore, in May, 1916, Alpha advised its sales department to quote dealers for acceptance not more than 15 days from date of quotation. In the event of an advance in price, Alpha was to have the privilege of extending these quotations to not more than 15 days after the date of the advance in price.[1]

Alpha dropped its immediate acceptance clause in a dealer quotation form in use beginning May 31, 1933, because in the past this clause had not been actually adhered to.[2]

Alpha's Vice President testified:

> "Q. Now, I notice that on May 31, 1933 you have omitted a statement of 'the price is for immediate acceptance' which appears on the prior quotations, I have specific reference to October 5, 1933.
>
> Will you explain why that was done? A. Well, as a practical matter, it was never enforced on the previous one. In other words, when we made a quotation to a dealer, while it said for immediate acceptance, as a matter of fact he could accept that and order shipments under that quotation at any time until he got a new quotation from us so that we simply dropped it as a matter of practicality; we dropped this matter of 'immediate acceptance' as

[1] Resp. Ex. 673: Interoffice memo dated May 25, 1916 from Alpha to Sales Department.

[2] Resp. Ex. 574: Alpha dealer quotation form in use beginning May 31, 1933.

not having any weight or any bearing on the transaction.[3]

> Q. . . . do you or do you not sell to customers where no specific project or specific work is involved? A. Oh, yes. I should say probably sixty to seventy per cent of our cement is sold that way; that is, where no contract is involved, but is sold on the open market for fifteen days shipment.
>
> Q. Is there any restriction of any kind on the amount of cement you will sell to dealers in this fashion? A. No, we will sell him all of the cement he will allow or take during a period of time, during any time within fifteen days and we will accept as large an order for cement during those fifteen days as he wants to take in."[4]

Huron eliminated from its dealer quotation form in March, 1933 the phrase:

> "This quotation is for immediate acceptance and shipment within fifteen days from date of order. Quantity is limited to one carload unless otherwise agreed upon. Prices for larger quantities and longer deliveries upon request."

In its place the following appeared:

> "Orders placed prior to above effective date will be prorated on basis of your average purchases during the past year and for shipment within fifteen (15) days from date of order. Larger quantities and longer deliveries for specific work must be arranged for immediately."[5]

The Navy Department has received at least one bid specifying that the cement bid upon was to be in not less than carload lots except with the consent of the contractor,

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[3] Coogan, Vice President, Alpha (R) Tr. 23420.

[4] Id., Tr. 23453-54.

[5] Resp. Ex. 2394 B-C: Quotation forms of Huron.

each delivery to be made within 31 days after the receipt of an order from the supply officer.[6]

Southwestern allows a 15 day acceptance period on quotations to dealers. During this 15 day coverage, it is optional for the dealer to buy or not as he wishes under the proposal. The dealer need not buy any cement, but if he elects to exercise his option on the 15th or 14th day after a quotation has been issued to him, whether it be for 10,000, 30,000 or 50,000 barrels, Southwestern would be compelled to enter into a contract with the dealer to furnish that cement.[7]

7. Bulk Cement

a. Statement of Term

Shipments of bulk cement were invoiced and collected for on a basis of track scale weights nearest to point of origin.

b. Documentary References

The above provision appeared only in the Compendium and in the specific sales contract and order forms attached to the Compendium,[1] and in [the specific sales contract form attached to the NRA Code.][2]

c. Comments of Witnesses

Alpha's vice president testified that bulk shipments in 1932 were about 2% of the company's total shipments, but had since risen to about 10%.[1]

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[6] Custer, Senior Administrative Assistant, Bureau of Supplies and Accounts, Navy Department (C) Tr. 21325-26.

[7] Warren, Vice President, Southwestern (C) Tr. 10906-09.

[1] Com. Ex. 561, pp. 13, 19, 23: Compendium of Established Terms and Marketing Methods dated December 9, 1935.

[2] Com. Ex. 557, p. 351: NRA Code of Fair Competition dated November 27, 1933.

[1] Coogan, Vice President, Alpha (R) Tr. 23416-17.

Edison announced on January 23, 1932 that bulk shipments were to be 50¢ per barrel less than Edison's price in cloth. This bulk differential was announced because of the constantly increasing demand for such shipment, especially on large highway projects. Edison recommended bulk shipment, listing its advantages as the elimination of sack investment, elimination of labor in handling sacks, and the elimination of sack losses. To encourage shipments in bulk, Edison stated that its representatives would offer the services of its engineering department in working out the proper and most economic shipment for unloading in bulk and handling at destination. This service was offered without charge.[2]

Lone Star's price in cloth of $2.05 carried a differential of 25¢ less for paper and 45¢ less for bulk.[3] These differentials were in effect for seven or eight years. At one time there was a 50¢ differential for bulk, and prior to that time it was 45¢. Lone Star has found that these differentials are the same for other companies, but there have been times when they were not the same.[4]

Pittsburgh changed its bulk differential on a bid to the Indiana State Highway Commission when it discovered that Lehigh had announced that when it shipped in bulk the price was 45¢ per barrel less than when packed in cloth sacks.[5]

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[2] Resp. Ex. 2566 Y-Z: Edison Sales Code announced January 23, 1932.

[3] Neylan, Ass't General Sales Manager, Lone Star (C) Tr. 6027-28.

[4] Id., Tr. 6028-29.

[5] Resp. Ex. 2886 A: Pittsburgh Interoffice Memo dated Aug. 5, 1932.

Resp. Ex. 2886 B: Letter dated July 28, 1932 from Lehigh to Wheeling Wall Plaster Co.

Letzkus, Sales Manager, Pittsburgh (R) Tr. 37928-29.

8. Delay in Delivery and Loss or Damage in Transit

a. Statement of Term

The seller was not liable to the buyer for any delays in manufacturing, shipping or delivering cement caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond the seller's control. During the time of such delays the seller had the right to prorate among its various customers such cement as it might be able to ship.

b. Documentary References

The above provisions appeared in the specific sales contract and order forms attached to the Compendium[1] and [to the NRA Code.][2] No recommendation of a similar kind appeared in the Code of Ethics[3] [or in the recommendations of the P.C.A.[4] A somewhat related provision appeared in the minutes of the A.A.P.C.M.[5] in that that Association recommended that the cement company be not responsible for loss or damage en route.]

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[1] Com. Ex. 561, pp. 20, 23: Compendium of Established Terms and Marketing Methods dated December 9, 1935.

[2] Com. Ex. 557, pp. 347, 351: NRA Code of Fair Competition dated November 27, 1933.

[3] Com. Ex. 138 N-U: Code of Ethics, dated 1929.
Com. Ex. 561, *supra*.
Com. Ex. 557, *supra*.

[4] Com. Ex. 3192: Trade Practices in the Cement Industry, published in January, 1919, by the Portland Cement Association.

[5] Com. Ex. 3193, pp. 4-5: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

c. Comments of Witnesses

Alpha's Vice President testified:

> "Q. What is your policy today, Mr. Coogan? A. It's the same thing today. We do not disclaim liability for any damage in transit. That is one thing that has not always been so in the interim. There have been times, when we, on our printed forms of quotation and contracts, where we disclaim responsibility, but as a matter of fact, there has been no case when we have refused to allow such claims and make our own claims on the railroad company, or if it was something for which we were responsible, we stand it ourselves. In other words, we found it was not a practical commercial thing to do. We would have endless fights with our customers in attempting to enforce such provisions; so while our forms for a time bore such a disclaimer, it was never actually put into force."[1]

Coplay, in making delivered prices, guarantees only the cost at destination and will not be responsible for shortage or damage occurring in transit. The Company disclaims responsibility after shipments are placed on the cars at their mill.[2]

Edison, in an announcement of January 23, 1932, stated that under certain circumstances claims for loss or damage in transit would be paid.[3]

The Louisiana Highway Commission's invitation to bid states:

> "The successful bidder shall be responsible for any damage to cement during transit."

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[1] Coogan, Vice President, Alpha (R) Tr. 23086-87.

[2] Twamley, Vice President, Coplay (C) Tr. 6776-77.

[3] Resp. Ex. 2566 Z 8: Edison Sales Code, announced January 23, 1932.

This provision has been included in the invitation during all of the Chief Engineer's experience.[4]

Volunteer's dealer contract form in use from September 8, 1933, provided a disclaimer of liability for loss or damage in transit.[5]

9. Impairment of Financial Responsibility of Buyer

a. Statement of Term

If at any time the financial responsibility of the buyer became impaired or unsatisfactory to the seller, the seller reserved the right to require payments in advance or satisfactory security or guarantee that invoices would be paid promptly when due.

b. Documentary References

A provision similar to the one above appeared in the specific sales contract and order forms attached to the Compendium[1] and [to the NRA Code.][2] The texts of the Compendium, NRA Code, and other trade association pamphlets made no recommendation in this connection.

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[4] Henderlite, Chief Engineer, Louisiana H'way Comm. (C) Tr. 13817.

Com. Ex. 2457 D: Standard Form of Louisiana H'way Comm. Proposal.

[5] Resp. Ex. 2276: Dealer contract form used by Volunteer, dated September 8, 1933.

10. Commercial Testing

a. Statement of Term

Charges incident to inspection or tests made for the buyer were to be paid by the buyer.

b. Documentary References

Provisions similar to this term of the specific sales contract and order forms appended to the Compendium[1] and [to the NRA Code][2] appeared in the Code of Ethics[3] and [in the recommendations of the P.C.A.[4] and of the A.A.P.C.M.][5]

11. Dealer Differential

a. Statement of Term

The differential to dealers has been of several types: trade discounts, price differentials, and undertakings by

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[1] Com. Ex. 561, pp. 18, 21: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 349: NRA Code of Fair Competition, dated November 27, 1933.

[1] Com. Ex. 561, pp. 20, 23: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 351: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 N-U; p. 2: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, pp. 17-18: Trade Practices in the Cement Industry published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, pp. 10-11: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

manufacturers to protect dealers on particular purchases going directly to contractors at such mark-up as the dealers care to put upon the order.

b. Documentary References

[The only trade association records in which provisions appeared as to a dealer differential were the pamphlets of the P.C.A.[1] and of the A.A.P.C.M.][2]

c. Comments of Witnesses

Evidence as to the origin, development and reasons for the use of the dealer differential in the industry is shown in Part XIV, Section E, page 2433 *et seq.*, and reference is here made to that evidence.

12. Diversions

a. Statement of Term

The buyer purchasing under a specific job contract represented that the specific amount of cement would be used in "the above described work" and agreed that no portion of the cement would be used for any other purpose without written consent of the seller. If any cement shipped under the contract was used for any purpose other than that specified, or diverted by the buyer from the specified place of delivery, the seller could cancel the contract and refuse to ship any more cement, and the buyer agreed to pay the seller's market price at the place of final destination for that cement which had been used for any other purpose or which had been diverted.

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[1] Com. Ex. 3192, p. 4: Trade Practices in the Cement Industry, published in January, 1919 by the Portland Cement Association.

[2] Com. Ex. 3193, p. 12: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

b. Documentary References

The only trade association recommendations similar to these provisions of the specific sales contract forms attached to the Compendium [and to the NRA Code] appeared in the texts of the Compendium,[1] [NRA Code][2] and Code of Ethics.[3]

c. Comments of Witnesses

Evidence as to the origin, development and reasons for the use of the above term is digested in Part XI B, *supra*, p. 1878 *et seq.* and in Part VIII, *supra*, p. 1739 *et seq.*, and reference is here made to that evidence.

C. Recommendations and Admonitions.

1. Specific Sales Contract and Order Forms

a. Statement of Admonition

Forms for future specific sales orders and specific sales contracts representing the best practices in the industry should be used. The order form should be used where a sale is made to a dealer. Contracts should be used to cover unfinished commitments with dealers who have used an order form to guard the dealer against an increase in the market price during his negotiation for sale on a specific job; to cover new commitments with the dealers at prices prior to an advance, when the commitments are closed during the period immediately following the advance; and

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[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods dated December 9, 1935.

[2] Com. Ex. 557, p. 339: NRA Code of Fair Competition dated November 27, 1933.

[3] Com. Ex. 138 N-U, p. 5: Code of Ethics of the Cement Institute published in 1929.

to cover initially all direct sales for delivery beyond 15 days.[1]

b. Documentary References

This recommendation appeared in the Compendium[1] and a more detailed version appeared in [the NRA Code.][2] The Code of Ethics[3] recommended the adoption of a standard form of sales contract, but did not provide such a form. [The pamphlets of the P.C.A.[4] and of the A.A.P.C.M.[5] show a recommendation for the use of standard forms for contracts with dealers and for orders.]

At the meeting of the trustees of the Institute on January 24, 1930, the general manager raised the question of uniform contract forms and the trustees referred the matter back to the manager to consult with counsel and report.[6]

On April 29, 1930 counsel for the Institute wrote to Smith, President of the Institute:

> "Since the last meeting of the Board of Trustees, we have given consideration to the matter of the preparation of a Uniform Sales Contract to be endorsed by The Cement Institute and recommended to the members for use. We have prepared a pre-

[1] Com. Ex. 561, p. 13: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[1] Id.

[2] Com. Ex. 557, pp. 340-342: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 N-U, pp. 2-3: Code of Ethics dated 1929.

[4] Com. Ex. 3192, pp. 13-14: Trade Practices in the Cement Industry, published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, p. 7: Report of the Committee on Trade Conditions, published in 1915, by the Association of American Portland Cement Manufacturers.

[6] Com. Ex. 136 oo-PP.

liminary draft of such a contract and have considered the legal questions involved in the adoption of such a contract by The Institute. I am not prepared to say that it would be illegal for The Institute to adopt a standard form of contract, but I believe that certain provisions of such a contract present some doubtful questions of legality. In my opinion it would be very unwise at this time to undertake anything which would raise any doubtful questions, and, accordingly, I am of the opinion that it would be wiser for The Institute to follow Mr. McConnell's suggestion and simply prepare a bulletin recomending to the members the provisions which should be embodied in a contract for the sale of cement. Mr. McConnell has submitted a comprehensive outline of the points that should be included in such a contract and I will proceed on these lines in collaboration with him."[7]

On July 14, 1930 the general manager issued a circular to members drawing attention to Article II of the Code of Ethics which recommends the standardization of sales contracts for the purpose of avoiding "incomplete, ambiguous and deceptive contracts" which provide "a medium for making unfair price discrimination, induces fraud and repudiation of such contracts, gives rise to disputes, and disturbs stability and business operation, to the consequent injury of the industry and the general public." The circular then stated:

[Italicized part quoted in Fdgs. Par. Seven (o)]

"Accordingly, the following report is submitted with the approval of Counsel. *It represents a statement of the recommendations of the Institute as to the provisions which should be included in a proper contract for the sale of cement as declared in Article II of the Code of Ethics, quoted above.*"

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[7] Com. Ex. 153 R.

The Cement Institute recommends to the members that proper contracts for the sale of cement should contain the following provisions:

1. A full and accurate statement of the name and address of Seller and Buyer.

[Italicized part quoted in Fdgs. Par. Seven (o)]

2. PRICE AND QUANTITY. *A definite agreement to sell and to buy a specific number of barrels of portland cement at a definite price or prices F.O.B. a specific destination or destinations, subject to terms and conditions as outlined.* The clause covering the price and destination of the cement should be followed by a clause, if desired, covering fluctuation in the price of cement below the price named in the contract for identical delivery.

3. DISCOUNTS. A clear statement of the cash discount allowed and the time limit for such cash discount.

4. WEIGHT AND QUANTITY. A clause similar to the following: 'The price above named is per standard barrel of four sacks each containing 94 lbs. net wieght of portland cement.'

5. PACKAGE. If cement is shipped in cloth or returnable sacks, a statement as to whether sacks are leased or sold, together with a statement of the terms and conditions under which the lease price will be refunded or returnable sacks will be repurchased by the Seller.

If cement is shipped in paper bags or in bulk, a definite statement of price as it may be affected by the package.

6. In order to prevent the 'padding' of contracts by buyers it is recommended that clauses similar to the following be included in every contract:

'USE OF CEMENT. The Buyer warrants to the Seller:

(a) That the cement to be delivered hereunder is for use on work described as follows (hereinafter designated as "the work"):

Location of work: .....

.....

Cement to be used by: .....

.....

Description of work: .....

.....

.....

(b) That on the date of the execution of this agreement of the user named above had a valid and subsisting contract for the construction of the work, or had made a definite appropriation, or had made the necessary financial arrangements, for the work.

(c) That he has sold the cement for the work and for the use of the user named above.

(d) That he has not, and will not, enter into any other contract with any other cement company for portland cement for the work, unless the Buyer shall specifically state in the 'Description of Work', above that he is purchasing under this contract only a part of the cement required by the work and he shall also state what part of the work is covered by this contract either in a fraction, or percentage, or a definite description of such part.

The Buyer agrees that the obligation of the Seller to deliver cement hereunder may be terminated, at the option of the Seller, if the work does not begin to use cement within ninety days from the date hereof, or if Buyer has made any material misrepresentation of fact as to the use, or user, of the cement purchased hereunder.

The quantity of cement named in this contract is subject to a variation according to the actual requirements of the work, but in no event shall the Buyer have the right to demand delivery of more than ten percent (10%) in excess of the amount stated herein, and in making demand for any additional cement the Buyer shall furnish to the Seller satisfactory evidence that all of the cement previously shipped to the Buyer under the contract was

delivered on the work, and that the additional cement is required and will be used on the work.

At the request of Seller, Buyer agrees to furnish to Seller a statement of the amount of cement delivered during each or any calendar month by Buyer under its contract for the work. The failure of Buyer to furnish Seller with such a statement, after request, shall relieve Seller of its obligation to make further shipments under this contract, until such statement shall be furnished. In any event, Buyer shall remain liable for any unpaid account due, or to become due, for shipments actually made by Seller on this or any other contract or agreement of sale existing between Buyer and Seller.

7. SHIPMENTS. The Buyer shall give to the Seller instructions in writing for shipments, a reasonable time before shipments are to be made, and the Seller shall not be obligated, except at its option, to make any shipments after date, and it shall at no time be obligated to make any shipments under this contract under any circumstances, after the work shall have been completed.

Freight in all cases is to be paid by the Buyer except where shipments are made to a prepaid freight station where prepayment of freight is required by public railroad tariffs, and in making payment for cement shipped and invoiced under this contract the Buyer must accompany such payment with receipted freight bill showing payment of all freight charges.'

8. A loss and damage clause protecting Seller from liability after delivery to common carrier or against any other loss occurring in transit or storage.

9. A clause protecting Seller against delays in manufacture or shipment caused by strikes, fires, etc.

10. A paragraph similar to the following should be included in each contract: 'In the event that at any time, or for any cause, Seller shall be unable to make and ship cement in accordance with its contracts and orders with the Buyer and/or other customers and/or dealers, the Seller may determine in

its discretion a pro rata share of the cement which shall be shipped to each of its customers and/or dealers under its contracts and orders, after reserving cement for its dealer's warehouse stocks, and may limit and reduce shipments against this contract according to such pro rata share as determined by the Seller. The Seller shall not be obliged to make any such limitation or reduction and Seller's determination as to the proper proportion to be allotted on this contract and other contracts, and/or orders to the Buyer and to its other customers and/or dealers shall be final.'

11. SPECIFICATIONS AND USE. A statement of the specifications of the cement together with a clause providing that Seller cannot be held responsible for improper use of cement and therefore will not guarantee finished work.

12. A clause or clauses similar to the following: 'If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory, in the judgment of the Seller, the Seller shall have the right to notify the Buyer in writing that it will require payment in advance, or the deposit of satisfactory security, or guarantees that invoices will be promptly paid when due. Such notification mailed to the Buyer by the Seller shall be final.

If Buyer fails to comply with the terms of payment or any other terms or conditions, the Seller reserves the right to cancel the unfilled portion of this contract and the Buyer shall remain liable for any unpaid account due, or to become due, for shipments actually made by the Seller.'

13. Proper clauses for execution in accordance with the requirements of each individual company."[8]

c. Comments of Witnesses

Aetna, Federal, Hermitage, Lehigh, Nazareth, Southwestern and Whitehall have used specific sales contract

[8] Com. Ex. 153 M-Q.

and order forms similar to the forms attached to the "Compendium".[1]

Aetna, during the code period, received a complaint because it sold under a specific sales contract for delivery reported for Dearborn, Michigan, whereas the project in question lay some twenty miles distant from Dearborn, and all points of delivery adjacent to the job were at a higher destination price than Dearborn.[2]

Alpha first used specific sales order forms when the Code became effective. It was adopted because it was a little more satisfactory to a dealer and gave him a little more protection in handling cement under a specific job. With this form Alpha would take a specific sales order from a dealer at a certain price. If the price were reduced, Alpha would continue shipping to the dealer on that specific sales order at the reduced price, but in the event of an increase, Alpha's price would remain the same as specified in the order.[3]

One reason Alpha adopted the specific sales order form was because it was one of the provisions of the Code.[4]

Alpha's Vice President testified:

> "Q. Just what is the purpose of the specific job contract, Mr. Coogan? A. The purpose is to give us something on which we feel we can hold our customer, and so we will have a definite order, and a definite commitment from him that he will take that

[1] Aetna: Resp. Ex. 1981 A-B.
Federal: Resp. Ex. 2087.
Hermitage: Resp. Ex. 2700.
Lehigh: Resp. Ex. 1120.
Nazareth: Resp. Ex. 1442.
Southwestern: Resp. Exs. 1694 A-B, 1696.
Whitehall: Resp. Exs. 1633, 1634.

[2] Resp. Ex. 2428: Letter dated April 27, 1934 from Luck, Sales Manager, Peerless to Code Authority. See also Part XIII, p. 2176.

[3] Coogan, Vice President, Alpha (R) Tr. 23452.

[4] Id., Tr. 23453.

cement for the particular work required within the time specified in the contract.

It gives us a little something definite on which we can base—on which we can base some little—what I am trying to say, is, on which we can get some little or some sort of estimate of future operations.

Q. Does it give the dealer anything? A. Yes, it gives the dealer and the consumer an absolute guarantee of the price beyond which we cannot go and enables them to sell to a contractor who might have bid on a specific job and used a specific price for the cement.

It assures that he will keep on getting the cement for that particular work."[5]

As to protecting a dealer on a bid, Coogan testified:

"Q. How do you provide for the prospective buyer who desires to be protected on a specific job where he has not got a contract, and where he has not yet received the award but merely anticipates it? A. Where we quote to the dealer and leave our quotations open for a stated period of time, now, if the contract is, or if the bids have been opened but the contract has not been awarded, or even if the bids have not been opened and the contract has not been awarded, and we should advance our price, we will protect the dealer.

We will make what we call a provisional contract with the dealer which will protect him and his customers on the cement in the event that he is awarded the contract.

Now, we do that only in case he is the low bidder. If he is the low bidder, on the job, and the job has not been awarded at the time these prices advance, he is given a provisional contract which protects him in the event he is given the job.

Q. Now, if the buyer obtains the award, is he then entitled to a specific job contract under the terms stated in your specific job contract? A. Yes, sir. He is."[6]

[5] Coogan, Vice President, Alpha (R) Tr. 23454-55.

[6] Id., Tr. 23458-59.

Ash Grove uses a specific sales contract. Less than half of the sales from the Chanute mills are covered in this form of contract and more than half of the sales from the Louisville mill are made on them.[7]

Cumberland's provisions in its contract forms were not copied word for word from other contract forms, but Cumberland's terms and conditions follow closely similar terms found in the field to be used by competitors.[8]

Hercules sells a substantial part of its cement on what is known as a specific job contract. A contract is supposed to be specific in that the cement covered is to be supplied only for a certain specified job.[9]

Lone Star's "Trade Ethics and Marketing Policies" provided that specific contracts with price protection were intended to cover business where a fixed price for finished work had been made and the time necessary for the completion of such work required delivery of cement as the work progressed. The price was to be "our price current at destination at time of shipment, but not to exceed price shown in original specific contract." For specific jobs requiring delivery of one or more cars as progress of the work requires, quotations would be issued giving the buyer 10 days to indicate his desire for protection thereunder and allowing 30 days in which to receive a bona fide award and in which to execute a contract for the cement required.[10]

Lone Star's vice president testified:

> "Q. Mr. Koch, do you recall the specific works contracts which we discussed yesterday or the day before? Those are the forms of your Company.
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> • • •

[7] Sunderland, President, Ash Grove (C) Tr. 13637.

[8] Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39837-38.

[9] Brobston, President, Hercules (C) Tr. 10563-64.

[10] Com. Ex. 1112: Trade Ethics and Marketing Policies issued by Lone Star of Indiana in 1929.

A. Well, yes, more or less. I had to do with the compilation of them originally. In late years, I have not worked with them so much.

Q. Now, were any of those provisions inserted in your contract forms as a result of any agreement or understanding with any of your competitors? A. Absolutely not.

Q. Were any of those provisions or conditions contained in those forms influenced or dictated by the Cement Institute? A. No."[11]

Missouri displayed an interest in a proposed standard sales contract and was told by the Institute that counsel had advised that the Institute should not attempt to prepare a uniform contract purely from a practical standpoint, but that the Institute could recommend various points which a proper sale and purchase contract should cover.[12]

National's dealer forms were adopted because of the recommended practice under the NRA. This form was used from 1933 to 1937. It was used in conjunction with an additional contract which the company had, which contract was a form used for sales to dealers for resale.[13] During the Code period, the specific job contract form of National was adopted and this form superseded the company's form for sales to dealers for resale.[14]

National's Vice President explained the source of the provisions of National's contract forms:

"Well, naturally, when I came back into the offices of the National Cement from in the field, they had a supply of contracts, and we continued to use

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[11] Koch, Vice President, Lone Star (R) Tr. 33074.

[12] Com. Ex. 147 D. Letter of February 28, 1930 from McConnell of the Institute to Alexander, Sales Manager, Missouri.

[13] Dannelly, Vice President, National (R) Tr. 39503-06.

[14] Id., Tr. 39506-07.

those. When your supply of contracts gave out, you always check over to see if there are any changes in appearance and wording of contracts that you would like to make, and, naturally, we made any changes in the contracts, we wanted them to carry with them as favorable conditions of purchase as we had found our competitors were offering in the field."[15]

Nebraska has used the same specific contract forms for over twenty years. Its forms were temporarily superseded during the Code period. The company superseded the use of that contract a short time after the expiration of the NRA.[16]

Northwestern has never used any contract form and has never agreed with any other cement company or any representative thereof, or with the Cement Institute or any other organization, as to any contract form. Seldom is any written memorandum, letter or other writing in the nature of a contract used. On a few rare occasions prior to November 1933 Northwestern Portland used quotation forms. When so used, that is prior to November, 1933, they were used in Northwestern's own discretion and not by the direction of any competitor or organization.[17]

Ryan, a Dealer, testified that about 30% of his domestic cement business was done on specific jobs. The specific job contract enabled him to buy cement for specific jobs when he had such a contract with a company. Ryan stated that 70% of his business was sold on a written contract where the selection of a brand was left up to the dealer.[18]

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[15] Dannelly, Vice President, National (R) Tr. 39662-63.

[16] Hoenig, Sales Manager, Nebraska (R) Tr. 42024-26.

[17] Hollister, President, Northwestern Portland (R) Tr. 48118.

[18] Ryan, Dealer (C) Tr. 7768-75.

South Dakota has used only two contract forms, one of its own prior to the NRA and a contract form approved by the NRA Code. Its original contract form was determined from copies of several forms used by other companies.[19]

Superior Portland never entered into any agreement with any other cement company or with the Cement Institute or any representative thereof as to the contract forms which it employs. It has never been the general practice of this company to use specific sales contract forms for sales to dealers or others in the ordinary course of business. They have been used only to a very limited extent. Prior to March 1930 the company had no printed contract forms, but used typewritten contracts to fit special cases. About March 1930 the company had its first contract form printed. This was used until February 1931, at which time the form was reprinted identical in form with the preceding form, except that the words "Superior High-Early-Strength Cement" were changed to "Superior Hyurly Cement".[20] This contract form of the company was re-printed on March 13, 1934 and was headed "Specific Sales Contract." A comparison of these forms of contract with the forms attached to the NRA Code and to the Compendium shows substantial differences.

Superior Portland's specific sales contract and order forms have been changed from time to time at the independent suggestions of the company's officials and attorneys, and not at the direction or suggestion or influence of any other respondent or person or party.[21]

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[19] Hartley, Sales Manager, South Dakota (R) Tr. 41529-30.

[20] Tongue, Secretary, Superior Portland (R) Tr. 42896-98.

[21] Id., Tr. 42897-98.

2. Specific Sales Contracts for Amounts in Excess of Actual Requirements

a. Statement of Admonition

Shipments on a specific sales contract or order of an amount in excess of the actual requirements of the work therein covered should be deemed an unfair method of competition.

b. Documentary References

This provision appeared only in the Compendium,[1] [although a somewhat similar provision appeared in the recommendations of the A.A.P.C.M.][2] and [NRA Code.][3]

3. Sales Below Cost

a. Statement of Admonition

The selling of industry products below cost, except to meet competition, should be deemed an unfair method of competition.

b. Documentary References

Provisions to this effect appeared only in the Compendium,[1] [NRA Code,][2] and in the Code of Ethics.[3]

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[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 3193, p. 7: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

[3] Com. Ex. 557, p. 339: NRA Code of Fair Competition, dated November 27, 1933.

[1] Com. Ex. 561, p. 17: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 335: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 N-U, p. 5: Code of Ethics, dated 1929.

4. Sale of Non-Industry Products

a. Statement of Admonition

The selling of non-industry products together with industry products at combined prices less than the sum of the prices for which such products are sold separately should be deemed an unfair method of competition.

b. Documentary References

Provisions to this effect appeared only in the Compendium,[1] [the NRA Code,][2] and the Code of Ethics.[3]

c. Comments of Witnesses

The National Builders Supply Association on February 7, 1930, wrote to the Institute suggesting that in the formulation of trade practice rules the Institute should give consideration to the practice of certain cement manufacturers of selling the contractor sand, gravel or slag, either direct or through a subsidiary, at a cut price in order to influence the sale of cement.[4]

5. Price Changes

a. Statement of Admonition

[A decline should be retroactive on all shipments made within five days before the effective date thereof. Advances should be made effective five days after the expira-

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[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 339: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 N-U, p. 3: Code of Ethics, dated 1929.

[4] Com. Ex. 150: Letter of February 7, 1930 from Campbell of the National Builders Supply Association to Blaine Smith of the Institute.

tion of the notice period, and the trade should be given such notice. No member of the industry should anticipate, by quotation, sale, contract or otherwise, any change until after the change has been on file at least five days in the office of the Code Authority. At the expiration of the five-day period, the change should be made effective and should be published.]

b. Documentary References

[Provisions to the above effect appeared in the NRA Code,][1] but did not appear in the Compendium.[2] The Code of Ethics recommended only that each manufacturer should make his prices and terms of sale public by broadcast to the trade so that interested persons might at all times have the accurate information.[3] [Trade practice reports of the P.C.A.[4] and of the A.A.P.C.M.[5] show that these associations recommended that no advance notice of price changes should be given and that price changes should become effective immediately when conditions necessitated a change.]

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[1] Com. Ex. 557, pp. 336-337: NRA Code of Fair Competition, dated November 27, 1933.

[2] Com. Ex. 561: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[3] Com. Ex. 138 N-U, p. 3: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, pp. 15-16: Trade Practices in the Cement Industry, published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, p. 3: Report of the Committee on Trade Conditions, published in 1915, by the Association of American Portland Cement Manufacturers.

6. Failure to Order Shipment Within the Time Specified

a. Statement of Admonition

The buyer should give the seller shipping instructions in writing, a reasonable time before shipments were to be made. If the buyer failed to order the shipment within the time specified extension of the time for delivery was solely at the option of the seller.

b. Documentary References

No recommendation, similar to this provision of the specific sales contract and order forms attached to the Compendium and [to the NRA Code,] appeared in the texts of the Compendium,[1] [NRA Code,][2] or Code of Ethics.[3] [A somewhat opposite recommendation, *i.e.*, against the extension of delivery dates, appeared in the recommendations of the P.C.A.[4] and of the A.A.P.C.M.][5]

7. Prepayment of Transportation Charges

a. Statement of Admonition

The prepayment of transportation charges on cement shipments to the trade, except to stations to which railroad tariffs require prepayment, should be deemed an unfair

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[1] Com. Ex. 561: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557: NRA Code of Fair Competition, dated November 27, 1933.

[3] Com. Ex. 138 N-U: Code of Ethics, dated 1929.

[4] Com. Ex. 3192, p. 12: Trade Practices in the Cement Industry, published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, p. 5: Report of the Committee on Trade Conditions published in 1915 by the Association of American Portland Cement Manufacturers.

method of competition, except in respect to shipments to departments of the United States Government or of state governments.[1]

b. Documentary References

Recommendation to this effect appeared only in the Compendium,[1] [NRA Code,][2] and in the Code of Ethics.[3]

[The Code Authority interpreted the code to mean that, on shipments to any given destination as to which regulations required the prepayment of freight from any shipping point, all members of the industry might prepay freight from their own shipping point to such destination. The object of this was to place all members of the industry on an equal competitive basis at such destinations.][4]

c. Comments of Witnesses

Alpha's vice president testified:

> "Q. Now, starting again with 1909, up to that time, was it your practice, or did you come to any set policy with respect to the payment of freight charges?
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> • • •
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> A. At that time, when we sold on a delivered price, we billed at the delivered price, and gave the cus-

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[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.
Com. Ex. 138 N-U: Code of Ethics, dated 1929.
Com. Ex. 560, p. 17: Amendment to NRA Code for the Cement Industry, dated May 11, 1935.

[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 560, p. 17: Amendment to NRA Code for the Cement Industry, dated May 11, 1935.

[3] Com. Ex. 138 N-U, p. 5: Code of Ethics, dated 1929.

[4] Com. Ex. 842: Interpretation No. 26 of the Code Authority.

tomer the privilege of deducting the freight, as I remember, at that time."[1]

The Iowa State Highway Commission makes provision in its invitation for bids requiring the seller to prepay freight. This method of payment does not suit the railroads very well, because they have to sign a voucher and there is a considerable delay in the time element. The Highway Commission also provides that if freight rates are changed, *i.e.*, either increased or decreased, the contract price will be varied accordingly. This latter provision protects both parties in that they simply recognize that the cost of transportation is protected as against an increase or a decrease.[2]

Sunderland, President of Ash Grove, testified:

"Q. The customer doesn't actually pay you the delivered price, does he? A. He certainly does.

Q. I thought he paid the railroad freight? A. As our agent.

Q. Oh! A. I so stated.

Q. Do you have a contract making those parties your agents? A. In that respect, we have a contract that they will pay the freight for our account and send it in as part payment of the invoice.

Q. In what form is such a contract put? A. Well, I can't tell you that. I think it is in our printed form."[3]

Marquette announced on December 30, 1939 that dealers and other cement buyers had been notified by one or more of Marquette's competitors that after December 27, 1939 those competitors would prepay freight on all shipments

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[1] Coogan, Vice President, Alpha (R) Tr. 23085-86.

[2] Blom, Assistant Administration Engineer, Iowa State Highway Commission (C) Tr. 11677-81.

[3] (C) Tr. 13634.

of cement. Marquette's announcement stated: "We assure our customers that we will do likewise."[4]

South Dakota prepays freight on a very small amount of cement. The dealer pays the freight to the railroad company and pays South Dakota the difference between the billing and the freight. Occasionally a car goes to two or more customers and the cement will be split. It is convenient for South Dakota to prepay freight on such shipments. Prepaying such freight is done more to save the company trouble than to accommodate its customers. At any rate the railroads would not split-bill such a shipment.[5]

Southwestern's sales manager wrote to all of its salesmen in March, 1929 and enclosed copies of a Riverside price list, asking the salesmen to note that only to non-agency stations would the company prepay freight.[6] Southwestern in 1934 provided that freight would be prepaid only to non-agency stations. In all cases the assignee was to pay the railroad freight charges, and such charges were credited to the account of the customer.[7]

Superior Portland requested for many years that customers submit paid freight bills to it for credit against their account. The company found, however, that many of its customers insisted on keeping the freight bill for their own records, and that the company's persistency in re-

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[4] Resp. Ex. 2990: Announcement of December 30, 1939 entitled "Marquette Prepays Freight on Cement".

[5] Hartley, Sales Manager, South Dakota State Cement Plant (C) Tr. 12778-80.

[6] Com. Ex. 1205 K-L: Bulletin to all Southwestern salesmen, dated March 1, 1929 from Partridge, Sales Manager, Southwestern.

[7] Resp. Ex. 3750: Price list of Southwestern for Arizona, effective May 2, 1934.

questing them caused hard feelings. Therefore, Superior Portland discontinued the practice.[8]

Volunteer's traffic manager testified:

> "Q. * * * What has been the policy of your company with respect to who pays the freight? A. Except to a prepay station, we have not paid the freight until just here recently, the last three or four weeks, when we began prepaying all shipments.
>
> Q. Are you aware of the circumstances under which that change in your policy came about? A. Yes.
>
> * * * *
>
> Q. Will you explain that to us? A. We received a telephone call from a customer at Atlanta, Ga., who gave us an order at the same time and requested the same be prepaid. We told him that we were not in the habit of doing so and that we could not prepay this shipment. He said that other companies were prepaying the freight, and read us a letter from a company to that effect.
>
> Q. Did you change your policy at that time? A. Not at that time we did not. We told him that we would not prepay that particular shipment, but we later called him back and told him that we would do so, and our policy has been changed to that extent, that we do prepay all shipments now.'"[9]

8. Shipment by a Transportation Agency Making a Concession

a. Statement of Admonition

Shipment by any transportation agency which makes a concession by rebate or otherwise should be deemed an unfair method of competition.

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[8] Tongue, Secretary, Superior Portland (R) Tr. 42906-07.

[9] Roberts, Traffic Manager, Volunteer (R) Tr. 31908-09.

b. Documentary References

Provisions to this effect appeared only in the Compendium[1] and [in the NRA Code of Fair Competition.][2]

c. Comments of Witnesses

[The Code Authority's chairman testified that the purpose of the clause concerning shipments by transportation agencies giving rebates was to make the open price provisions of the Code effective. If a manufacturer purported to sell cement at a filed destination price of $2 and the transportation agency paid the buyer 20¢, this would have been a violation of the Code because that purchaser would have secured cement at a price otner than the price filed.][1]

9. Land Grant or Special Freight Rates

a. Statement of Admonition

Where land grant or special freight rates are applicable to shipments to the United States Government, such shipments should be quoted so as to insure to the Government the full benefit of such land grant or special rates.

b. Documentary References

The only trade association record in which the above provision appeared was the Compendium.[1]

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[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 338: NRA Code of Fair Competition, dated November 27, 1933.

[1] Reiter, Chairman, Cement Code Authority (C) Tr. 17029.

[1] Com. Ex. 561, p. 14: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

c. Comments of Witnesses

Evidence as to the reasons for this provision, and as to sales made involving land grant rates appears in Part IV C, p. 792 *et seq.*, and reference is made to that evidence.

10. Special Benefits

a. Statement of Admonition

The extension to buyers of a special benefit in any form not available to all buyers similarly situated should be deemed an unfair method of competition.[1]

b. Documentary References

Provisions similar to the above recommendation appeared in the Compendium[1] and in the Code of Ethics.[2] [The NRA Code stated it to be an unfair method of competition to give or offer money or anything of value to petition to make any secret payment, rebate, refund, or extend special services not extended to all purchasers on like terms.[3] The pamphlets of the P.C.A.[4] and of the A.A.P.C.M.[5] contained provisions somewhat similar.]

[The Code Authority interpreted the code to mean that a gift by any member of the industry to a purchaser, even

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[1] Com. Ex. 561, p. 14: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.
Com. Ex. 138 N-U, p. 3: Code of Ethics, dated 1929.

[1] Com. Ex. 561, p. 15: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 138 N-U, p. 3: Code of Ethics, dated 1929.

[3] Com. Ex. 557, Art. X 4 (c), p. 338, NRA Code.

[4] Com. Ex. 3192, p. 16: Trade Practices in the Cement Industry published in January, 1919 by the Portland Cement Association.

[5] Com. Ex. 3193, p. 16: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

where the gift was filed as a part of the terms of sale, constituted a violation of the Code.][6]

[The Code Authority held it to be unfair method of competition for a manufacturer to purchase, either directly or indirectly, fuel or supplies at prices in excess of the market price at the time of purchase for the purpose of inducing the sale of cement.][7]

The Institute's "Compendium" and "Code of Ethics" declared it to be an unfair trade practice to pay or offer to pay any advertising expense of purchasers or users, to indulge in excessive entertainment of them, to give or offer to give premiums, personal gifts, or gifts of industry products or any other commodity or article of value to purchasers or users.[8]

The Institute's "Compendium" declared it to be an unfair trade practice to purchase bonds or other securities issued to finance construction work, to accept such bonds in payment for cement, to endorse or guarantee such bonds, or to relieve a bidder from the responsibility for, or the expense of, providing such bonds. The Institute's "Code of Ethics" contained a somewhat similar provision confined, however, to sales of cement for railroad construction.[9]

The Institute's "Compendium" and "Code of Ethics" declared it to be an unfair method of competition for a manufacturer, for the purpose of inducing the sale of cement, to purchase, either directly or indirectly, fuel or sup-

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[6] Com. Ex. 1039 B-D: Code Authority Interpretations Nos. 55 A & B, dated Feb. 10 and Feb. 26, 1934, respectively.

[7] Com. Ex. 560, p. 19: Amendment to NRA Code for the Cement Industry.

[8] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.
Com. Ex. 138 N-U, p. 4: Code of Ethics, dated 1929.

[9] Com. Ex. 561, pp. 16-17: Compendium of Established Terms and Marketing Methods, dated Dec. 9, 1935.
Com. Ex. 138 N-U, p. 4: Code of Ethics, dated 1929.

plies at prices in excess of the market price at the time of purchase.[10]

The Institute's "Compendium" classed as an unfair trade practice the "furnishing of articles or facilities of a definite physical nature whether by way of a loan, lease or otherwise, without receiving commensurate consideration therefor."[11]

Lone Star's "Trade Ethics and Marketing Policies" provided that entertainment of buyers was considered a rebate.[12]

11. Commissions on Sales

a. Statement of Admonition

Compensating salesmen in any manner other than by a fixed salary on a full-time basis, and paying or offering to pay any commission for the sale of cement, should be deemed an unfair method of competition.

b. Documentary References

Provisions to this effect appeared in the Compendium[1] and [in the NRA Code.][2] No related recommendation appeared in the Code of Ethics, [but the pamphlets of the

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[10] Com. Ex. 561, pp. 16-17,
Com. Ex. 138 N-U, p. 4.

[11] Com. Ex. 561, p. 17: Compendium of Established Terms and Marketing Methods, dated Dec. 9, 1935.

[12] Com. Ex. 1112, p. 14: Trade Ethics and Marketing Policies published by Lone Star of Indiana in 1929.

[1] Com. Ex. 561, p. 16: Compendium of Established Terms and Marketing Methods, dated December 9, 1935.

[2] Com. Ex. 557, p. 338: NRA Code of Fair Competition, dated November 27, 1933.

P.C.A.[3] and of the A.A.P.C.M.[4] recommended that commissions should not be paid to dealers.]

D. Committee on Forms of Contracts.

The trustees of the Institute at their meeting on January 11, 1934 passed a motion that "a committee be appointed by the Chair to study the form of trade quotation, specific job quotation, invoice, sales order and sales contract, and report back to the Board".[1] The Chair appointed W. S. Storey as chairman and A. J. Rooney and H. R. Robeson as members of the Committee. At the meeting of the Board on March 15, 1934, the Chair called upon this Committee to report and the minutes record that "Mr. Storey stated that in view of the fact that Article XI had been suspended, the Committee has not functioned since that date."[2] Lundborg, Secretary of the Institute, reporting to the general manager on June 19, 1935 as to this Committee, wrote:

> "Due to the suspension of Article XI of the old code in January, 1934, this Committee has never been active."[3]

By action of the Board of Trustees on December 9, 1935 withdrawing support for all activities and committees of the Institute, except those mentioned in its resolution, this Committee was automatically discharged.[4]

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[3] Com. Ex. 3192, p. 5: Trade Practices in the Cement Industry published in January, 1919 by the Portland Cement Association.

[4] Com. Ex. 3193, pp. 13-16: Report of the Committee on Trade Conditions, published in 1915 by the Association of American Portland Cement Manufacturers.

[1] Com. Ex. 617 E: Trustees' Minutes, January 11, 1934.

[2] Com. Ex. 619 B: Trustees' Minutes, March 15, 1934. As to the suspension of Article XI of the Code, see Part XIV C 5.

[3] Com. Ex. 593 A-B.

[4] Com. Ex. 624 D: Trustees' Minutes, December 9, 1935.

PART XVI

FOREIGN CEMENT

A. Extent of Foreign Competition.

Insofar as there is evidence in point the following table lists thirty respondent companies which sell and thirty-four companies which do not sell cement in competition with cement imported from foreign countries. There is no evidence as to those companies marked in the table with an asterisk, but the individual Answer of each such company denies sales made in competition with foreign cement.

Companies Selling In Competition With Foreign Cement	Citation	Companies Not Selling In Competition With Foreign Cement	Citation
Alpha	Tr. 23817	Aetna	Tr. 30173
		*Arkansas	
		*Ash Grove	
Beaver	Com. Ex. 644 K; Resp. Ex. 750	Bessemer	Tr. 32174
Coplay	Tr. 6821-22	*California	
		*Colorado	
		*Cumberland	
		*Dewey	
Edison	Tr. 35767		
Florida	Com. Ex. 534 B, F, J; Resp. Ex. 750	Federal	Tr. 30761-62
Georgia	Tr. 26206, 48101	Green Bag, W. Va.	Tr. 29537-38
Giant	Tr. 26206, 48103-04		

Companies Selling In Competition With Foreign Cement	Citation	Companies Not Selling In Competition With Foreign Cement	Citation
Glens Falls	Tr. 7839		
Hercules	Tr. 26191-92	Hawkeye	Tr. 41614
		Hermitage	Tr. 36335
		Huron	Tr. 33673-7
		*Idaho	
Keystone	Tr. 27445-46	Kosmos	Tr. 36995
Lawrence	Tr. 7341		
Lehigh	Tr. 26939-40		
Lone Star	Tr. 6529-30, 32891-92		
Medusa	Tr. 40073	Marquette	Tr. 39037
		Missouri	Tr. 37127-2
		Monarch	Tr. 42195
		*Monolith-Midwest	
National	Tr. 39593	Nebraska	Tr. 41965
Nazareth	Tr. 28142-43		
North American	Tr. 8264, 33871	Northwestern States	Tr. 36487-8
Northwestern	Tr. 48120-21		
Oregon	Tr. 26206, 48102; Resp. Ex. 750	*Oklahoma	
Penn-Dixie	Tr. 38172	Peerless	Tr. 34325-2
		Petoskey	Tr. 38766
		Pittsburgh	Tr. 37753-5
		Riverside	Tr. 42882
Santa Cruz	Com. Ex. 644 H	*Spokane	
Southern States	Tr. 37550-51	Standard	Tr. 29604, 48105-06
Southwestern	Tr. 39131, 47669		

Companies Selling In Competition With Foreign Cement	Citation	Companies Not Selling In Competition With Foreign Cement	Citation
Superior Portland	Tr. 42908	Superior	Tr. 29604,
Trinity	Com. Exs. 1274 A, 1275 I, 1951 A	*Three Forks	
Universal Atlas	Com. Exs. 1161, 1951	*Union	
		Utah	Tr. 29604, 48105
Volunteer	Tr. 31698		
Vulcanite	Tr. 26206; 48106-07		
West Penn	Tr. 27811	*Wabash	
Whitehall	Tr. 28531	Wolverine	Tr. 35920

Alpha comes into competition with foreign cement at many points on the Atlantic Seaboard and at some ports on the Gulf of Mexico. From 20% to 25% of Alpha's total annual shipments are made into territories in which foreign cement is sold.[1]

Edison has found itself in such competition in the metropolitan districts of New York, Boston and Philadelphia.[2]

Hercules comes into such competition all along the Atlantic seaboard, but chiefly at the ports of New York and Boston. Fifty percent of the sales of the company are made in areas in which foreign cement affects the price.[3]

Keystone cement is sold in competition with foreign cement along the Atlantic Coast, principally in the areas around Boston, New York, Philadelphia and Baltimore.

[1] Coogan, Vice President, Alpha (R) Tr. 23816-17.

[2] Sweeney, Vice President, Edison (R) Tr. 35767.

[3] Brobston, President, Hercules (R) Tr. 26191-93.

About 50% of the Company's distribution is affected by imported cement in these areas.[4]

Lehigh has felt the impact of foreign competition in New York and Boston. It became quite severe in these areas about 1925. Within a few years thereafter the Company began feeling the impact of foreign cement with equal severity throughout the South Atlantic ports and at practically all ports on the Gulf of Mexico. The amount of cement imported has increased quite materially except for the years during the depression.[5]

Lone Star meets the competition of foreign cement from Boston south to the principal ports of the Atlantic and Gulf of Mexico as far as Brownsville, Texas. At some of these ports this competition has continued regularly. At others it has been spotty. Lone Star first competed with foreign cement in Galveston, Texas, in 1905 or 1906. In these early days the consumption of cement was not heavy in the United States, and this competition was not very great. The problem of foreign cement became very acute to Lone Star in 1925 and 1926.[6]

Lone Star's mills at Hudson, Nazareth, Norfolk, Birmingham, have been directly affected on the Eastern Coast and Louisiana and Texas on the Gulf Coast.[7] The Company from time to time has made special prices to meet foreign competition in areas described by the Company's Assistant General Sales Manager as follows:

> "A. I believe in the southeast, starting from North Carolina south, to a certain section of Florida, there are low prices in effect there. Then there is an area where it takes in Virginia, Maryland, that is the eastern shore, Delaware, Pennsylvania and a section of New Jersey, where there are none. Then you go

[4] Scott, H. M., President, Keystone (R) Tr. 27445-46.

[5] Bowen, Vice President, Lehigh (R) Tr. 26939-46.

[6] Koch, Vice President, Lone Star (R) Tr. 32891-95.

[7] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6529-30.

up into New England and there are some prices in effect along the New England coast.

Q. Specially low prices? A. There are lower prices, yes.'"[8]

Lone Star has found that between 10% and 15% of the total cement it produces is sold in competition with foreign cement in the New York area.[9]

Medusa meets with this competition only in and around Baltimore and possibly at a few other points on the Eastern Seaboard. At these points Medusa's volume of business is small.[10]

National's business has been affected by imported cement in the Atlantic Seaboard and Gulf markets.[11]

Nazareth finds this competition in New York, Boston and Philadelphia. The problem is most serious in New York City, because New York is an important market to Nazareth, and foreign cement is sold there at lower prices than Nazareth can hope to sell it.[12]

Southwestern's El Paso mill comes into competition with cement imported from Mexico by truck.[13]

ANNUAL IMPORTS

The following table shows in round figures cement imports for the four year period from 1922 to 1925 and for the four year period from 1934 to 1937:

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[8] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6532-33.

[9] Id., Tr. 6548.

[10] Dawson, Vice President, Medusa (R) Tr. 40073.

[11] Dannelly, Vice President, National (R) Tr. 39593.

[12] Robeson, Vice President, Nazareth (R) Tr. 28138-40.

[13] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39131.
Merrill, Vice President, Southwestern (C) Tr. 8862.

since it had abandoned this market in 1927 when the freight rate structure had been changed.[20]

In April 1936, in the course of interoffice correspondence, Blair, Texas Sales Manager of Southwestern, referred incidentally to the importations of foreign cement at Corpus Christi, Texas:

> "A second meeting was held with the Committee with reference to the foreign cement coming into Corpus Christi, Texas, and while we are not interested in that market, I was asked to attend the meeting and was asked to secure from you the method of combating the foreign cement in Los Angeles, so I would like for you to have Partridge give me all the information he can regarding that situation which I can pass on to those interested in the Corpus Christi market."[21]

On May 16, 1936 Blair wrote on this subject to his superior officer:

> "I expect to leave tomorrow night for Austin for highway letting on Tuesday and Wednesday which has two good sized jobs in our territory and at the same time I can attend a meeting of the Texas mills regarding foreign cement about which Partridge wrote me recently and also other matters pertaining to cement business in Texas. • • •"[22]

And on July 25, 1936, Blair wrote:

> "I returned yesterday morning from the trip to San Antonio which was particularly with reference to the foreign cement situation at Corpus Christi. While we were not particularly interested in that

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[20] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39138.

[21] Com. Ex. 1275 A-D: Letter dated April 25, 1936, Blair to Merrill, Vice President, Southwestern.

[22] Com. Ex. 1275 E-F: Letter dated May 16, 1936, Blair to Merrill, Vice President, Southwestern.

situation, having withdrawn from that market several years ago, I was able to get considerable information regarding not only the situation there, but at some of the other Texas ports and from Mr. Storey of the Trinity Company, who was there from Chicago, I received considerable information regarding the foreign situation in Florida.

Mr. P. B. Brazelton of the Brazelton Lumber Company at Waco, who is Chairman of the Cement Committee of the Line Yard Association, is to be in Corpus Christi tonight with Mr. Odham of the Lone Star Company, for a meeting with the Corpus Christi dealers.

Charlie Baumberger of the San Antonio Portland Cement Company will also be there and they hope to prevail on the Corpus Christi dealers not to bring in any more of this foreign cement for the present.

* * *

It was decided they could not very well fight this on a price basis, but through cooperation with the retail dealers with whom we have at present most friendly relations. Mills interested in that market were hopeful something satisfactory could be worked out.'"[23]

Trinity, at different times was affected by these importations. In a letter dated April 17, 1928 to F. H. Powell, President of Southwestern, W. H. L. McCourtie, President of Trinity, referred to the dealers who had been "flirting with Belgian cement" and stated that they were "all now pretty well back in the foal, and have agreed to stay back and admit that they do not care to play truant any longer."[24]

On April 17, 1936 C. H. Boice, Texas Sales Manager of Universal Atlas, in a letter to O. H. D. Rohwer, Assistant

[23] Com. Ex. 1275 I-J: Letter dated July 25, 1936, Blair to Merrill, Vice President, Southwestern.

[24] Com. Ex. 1274 A-B.

General Sales Manager of that company, adverted to the situation at Corpus Christi, Texas. He stated that most of the dealers in Corpus Christi did not want to handle foreign cement, but they were forced to do so in order to meet a local competitive situation. Various ideas and suggestions exchanged:

> "* * * and it was decided that each would endeavor to get together all the data possible on how to combat this foreign competition and Cox of Longhorn is to bring the matter up again in about 30 days for a further discussion, the thought being that this present cargo coming in will take care of the cement requirements in that port for the next 60 to 90 days at least."[25]

But there is no evidence that steps were taken to implement these suggestions and discussions.

In the memorandum dated October 8, 1930, by Kelly, Sales Manager, to Stone, General Sales Manager of Universal Atlas, it is reported that one Dan Long had recently returned from Europe where he had negotiated on behalf of the General Builders Supply Company for the importation of cement from Holland. The memorandum continues:

> "Suggested to Mr. Elcock in a general conversation with Dan Long, whom we can locate at any time, to intimate such activities on his part will disrupt conditions in New York City by bringing about lower prices, which of course will mean less foreign cement coming into this market, and that it would be advisable to tell those with whom he is working to proceed very slowly with the amount they bring in, for if the amount grows too big action will be taken to make the market unprofitable to him and his associates, but not to indicate this is coming from us—these remarks to Dan Long are coming from Elcock and not from us.

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[25] Com. Ex. 1951 A-B.

I am following this foreign cement matter very closely as I am fearful of its effect on prices."[26]

Ten witnesses testified that imported cement is resold to users at prices considerably lower than the prices at which domestic brands are sold.[27]

The evidence shows that nine of the thirty respondents selling cement in competition with imported cement do not have any fixed policy or practice with respect to the competition of foreign cement.[28] These are Medusa,[29] National,[30] North American,[31] Northwestern,[32] Southern States,[33] Superior Portland,[34] Volunteer,[35] West Penn,[36] and Whitehall.[37]

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[26] Com. Ex. 2657.

[27] Miller, W. T., Dealer, Jenney & Lux (C) Tr. 7377.
Wray, Dealer, Waldo Bros. & Co. (C) Tr. 7885.
Ryan, Dealer, N. Ryan & Co. (C) Tr. 7776-77.
Bowen, Vice President, Lehigh (R) Tr. 26946.
Duffy, S. V., President, J. P. Duffy Co., Dealer (C) Tr. 7901-02.
Grimmelman, Cement Importer, Bimco Trading Inc. (C) Tr. 19025, 19042.
Robeson, Vice President, Nazareth (C) Tr. 19056, (R) Tr. 28414-15.
Coogan, Vice President, Alpha (R) Tr. 23816-17.
Scott, H. M., President, Keystone (R) Tr. 27446-47.
Dain, Dealer, Katonah Lumber, Coal & Feed Co. (C) Tr. 7962.

[28] See Section A, *supra*, p. 2623 *et seq.*

[29] Dawson, Vice President, Medusa (R) Tr. 40078.

[30] Dannelly, Vice President, National (R) Tr. 39593-94.

[31] Porter, President, North American (R) Tr. 33871-72, 34089-90.

[32] Hollister, President, Northwestern Portland (R) Tr. 48120-21.

[33] Elcock, Vice President, Southern States (R) Tr. 37551.

[34] Tongue, Secretary, Superior Portland (R) Tr. 42908.

[35] Lewis, Manager, Volunteer (R) Tr. 31698-700.

[36] McKee, Vice President, West Penn (R) Tr. 27811.

[37] Elliott, Vice President, Whitehall (R) Tr. 28532-35.

C. Methods of Competing With Foreign Cement

1. Introduction

The evidence shows that cement imported from foreign countries is sold at prices lower than those for which domestic brands are sold.[1] As a result some respondents whose markets have been invaded by foreign brands have used various methods from time to time to compete with foreign cement. The evidence as to these several methods is divided into the following five categories, namely, (1) refusal to sell to dealers handling foreign cement; (2) placement of stocks accessible to dealers competing with foreign cement; (3) establishing price bases at ports of entry having commodity rail rates on outgoing traffic, the evidence upon which is set forth in Part II E 4, p. 576 *et seq.*; (4) making "special prices" at such ports having no commodity rail rates available, the evidence upon which is set forth in Part II E 5, p. 581 *et seq.*; and, (5) protest against tariff reductions prepared and submitted to governmental authority by the Tariff Committee of the Institute, evidence concerning which is shown in Part XI D 4, pp. 2014-15.

2. Refusal to Sell to Dealers Who Handled Foreign Cement

This evidence is discussed under two heads: (a) dealer testimony in (i) the Greater Boston area, and (ii) the Greater New York area, and (b) respondents' testimony.

a. Dealer Testimony

i. *Greater Boston Area*

W. T. Miller, President of Jenney & Lux, of Boston, testified that since its establishment in 1925, this firm has

[1] See Section B, *supra*, p. 2638 *et seq.*

imported cement from various European countries, and distributed it principally in New England to building material dealers.[1] The disadvantages in handling foreign cement were the delay in delivery and the natural prejudice against foreign material which has no marked superiority in quality.[2] Early in 1933 dealers told Jenney & Lux that they would have to give up handling imported cement because suppliers of domestic cement had advised the dealers that they would refuse to sell domestic cement to them as long as they purchased imported cement.[3] Jenney & Lux actually lost customers because of this policy.[4] Customers whom Jenney & Lux lost under these circumstances included the J. P. O'Connell Company of Boston, The Boston Sand & Gravel Company, The Boston Concrete Corporation, The Crystal Sand & Gravel Company of Braintree, Mass., The Watertown Builders Supply Co. of Watertown, Mass., The J. Massirman Company of Chelsea, The Waltham & Lyman Cement Company of Waltham, The Widdemore Company of Boston and F. Diehl & Sons of Wellesley.[5] This importing firm lost about half of its dealer business because manufacturers refused to sell to dealers handling imported cement.[6]

Jenney & Lux in July and August, 1933, discovered several of the sales representatives of domestic cement companies, serving the Boston market, stationed outside its warehouse gates on different dates. A representative of one manufacturer would be at the gate of the warehouse one day and a representative of another the following day. These salesmen were keeping a record of the trucks of

[1] (C) Tr. 7373.

[2] Id., Tr. 7376.

[3] Id., Tr. 7378-79.

[4] Id., Tr. 7380.

[5] Miller, W. T., Dealer, Jenney & Lux (C) Tr. 7380, 7437-38.

[6] Id., Tr. 7436.

Jenney & Lux or of the trucks of Jenney & Lux's dealers who were taking delivery of imported cement. The company kept a record in its office of the salesmen of domestic producers who were found stationed at the company's warehouse gates. They included representatives of Lone Star, Hercules, Universal Atlas, Alpha, Lawrence, Edison, Nazareth, Allentown, Giant and Lehigh.[7]

Wray, of Waldo Bros., Boston dealers, testified that there was a time when he had no difficulty in getting supplies of domestic cement, although at that time other Boston dealers were having difficulty. Later, in August 1934 this dealer was informed that he was on the black list, composed of dealers who handled foreign cement. At this time Alpha, Coplay, Glens Falls, Lehigh, Lone Star, Medusa, Nazareth and all cement companies shipping into New England refused to sell cement to this dealer, Keystone and Lone Star returning orders placed with them by Wray. National Portland, however, was willing to sell domestic cement to Wray at all times during this period.[8]

Wray also testified that during a conversation as to the possibility of limiting imports at the port of Boston representatives of Universal Atlas stated that the matter would be referred to the Cement Institute at its next meeting.[9]

ii. *Greater New York Area*

J. J. Ryan, President of N. Ryan & Co., dealers at Brooklyn, New York, testified that he had been selling foreign cement for about 10 years.[10] In December, 1933

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[7] Miller, W. T., Dealer, Jenney & Lux (C) Tr. 7409-41; Com. Ex. 1161: List of Jenney & Lux dated August, 1933.

[8] Wray, Dealer (C) Tr. 7820-40; Com. Ex. 1179 A-F: Correspondence between Waldo Bros. and Lone Star, Keystone.

[9] Id., Tr. 7814-18.

[10] (C) Tr. 7714-17, 7781.

or 1934[11] a boatload of foreign cement arrived at his dock. Before twelve o'clock on that day domestic manufacturers of Portland cement, who shipped into the metropolitan area, including Lehigh, Universal Atlas, Penn-Dixie, Nazareth and Lone Star, notified him that they would discontinue furnishing cement to his company until he refused to handle foreign cement.[12] [J. P.] Jordan, whom the witness identified as a Nazareth salesman, told him that he was on the black list for handling foreign cement.[13]

Ryan testified;

> "The Witness: Well, I had personal discussion with Mr. Bert Swett of the Lehigh and Mr. Dan Long of the Penn-Dixie, and Mr. Walter Elcock of the Universal Atlas, and they told me that the consensus of the opinion or the decision of the domestic Portland cement manufacturers in this particular area was that they had decided that they would not recognize me as a dealer if I continued to handle both foreign and domestic.[14]
>
> • • •
>
> Q. Did you have similar understandings with the other representatives of the cement manufacturers at that time? A. Well, with the others it was a general understanding.
>
> Q. To the same effect? A. The same effect along the same lines."[15]

Upon direct examination, the witness testified that he was unable to purchase domestic cement during the first six months of 1934.[16] Referring to a conference he had

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[11] The witness was not certain as to which date was correct; compare Tr. 7717-18 with Tr. 7781-82.

[12] (C) Tr. 7717-18.

[13] (C) Tr. 7718-20, 7734-35.

[14] (C) Tr. 7756-57.

[15] (C) Tr. 7759-60.

[16] (C) Tr. 7720.

with Fredenburg a salesman of the Allentown Portland Cement Company, he testified:

> "* * * I had a conversation with him along the lines that he regretted that it was still so that he could not furnish us domestic cement.
>
> Q. Did he say why? A. That he had received a message himself, that is, at his New York office, that the Cement Institute had given instructions to the Allentown office that the Allentown Portland Cement Company was not to furnish or supply any dealer in this area with domestic Portland cement that was handling the foreign."[17]

Upon cross-examination, however, he fixed the period of his "shut-off" as the last six months of 1934 and the first six weeks of 1935.[18] Furthermore, the witness admitted that at all times he could purchase domestic cement to fulfill specific job contracts,[19] on which foreign cement is not used,[20] and which constituted 30% of the witness' sales of domestic cement.[21]

Upon cross-examination, the witness stated:

> "Q. Mr. Ryan, when did you say this conversation took place? A. In the early part of 1934.
>
> Q. Did you make any pencil memorandum of the conversation at the time? A. I had not, because he was the only one that made such a statement that his office had received instructions from the Institute.
>
> Q. And did he tell you how these instructions were received from the Institute? A. No, that was just his conversation that he had received this message personally himself from his Allentown office

[17] (C) Tr. 7993-94.

[18] (C) Tr. 7766-68, 7774.

[19] (C) Tr. 7720, 7768.

[20] (C) Tr. 7770.

[21] (C) Tr. 7773-74. See discussion of specific job contracts, Part XI B, *supra*, p. 1878 *et seq.* Part XV C 1, *supra*, p. 2596 *et seq.*

that they had received instructions at the Allentown office from the Cement Institute.

Q. Did you find out from him how these instructions came from the Institute, what form they took? A. No, he did not say whether he had it in writing, but that was his instruction that had been given his Allentown office and he had been informed here in the New York office."[22]

Ryan stated that in December, 1934, Walter B. Elcock, at that time metropolitan Sales Manager for Universal Atlas, mentioned to the witness that there was a possibility that Elcock might be able to persuade other domestic Portland cement manufacturers to reinstate the witness and furnish him with domestic cement, as a dealer, if he discontinued the use of foreign cement.[23] The witness explained that Elcock was endeavoring to get some of his business, and seemed to be willing to work with him. Elcock requested the witness to prepare a statement in order that he might be able to submit it to his interests.[24] The witness complied with the request,[25] and addressed a letter, dated December 27, 1934, to Elcock, care of Universal Atlas, as follows:

"With reference to us handling Foreign Cement, we are pleased to state that our position is the same today as it was sometime ago when we agreed and understood that our competitors also agreed to discontinue handling Foreign Cement.

As you know that they did not live up to this agreement and we feel that their action justifies us in resuming the distribution of Foreign Cement.

We are pleased to assure you, however, that we are handling Foreign Cement only to meet a com-

[22] (C) Tr. 7934-35.

[23] (C) Tr. 7720-21.

[24] (C) Tr. 7725.

[25] (C) Tr. 7721-22.

Year	Number of Barrels Imported		Citation
1922	323,000	barrels	
1923	1,678,000	"	
1924	2,010,000	"	
1925	3,655,000	"	
1934	266,000	"	Tr. 8264
1935	618,000	"	"
1936	1,659,000	"	"
1937	1,792,000	"	"

One cement importer testified that the increase in cement imports during the period beginning in 1935 is accounted for in part by the discontinuance of the "black list" and in part by the fact that on May 1, 1935 the tariff on cement imports was reduced from 22.8¢ per barrel to 17¢ per barrel.[14]

B. Imported Cement Prices: Company Policy With Respect to Foreign Cement.

Alpha on occasions has found the price of imported cement to be from 35¢ to 50¢ a barrel less than its price.[1] The Company frequently has met the prices of foreign cement in areas in which foreign cement has been sold. When these depressed prices were in existence the Company's net at the mill was materially less than its normal net would have been.[2]

Alpha did not abandon markets in which foreign cement was sold because the Company expected to continue doing business in those markets, and, if it had left them, it would have been almost impossible to get back into those markets.[3] In many cases the Company was able to

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[14] Miller, W. T., Dealer, Jenney & Lux (C) Tr. 7481-84.

[1] [illegible]gan, Vice President, Alpha (R) Tr. 23817.

[2] Id., Tr. 23833.

[3] Id., Tr. 23834.

get a little more money for its cement than imported cement sold for, because a great many people prefer domestic cement and because the Government has preferred domestic cement when it costs not more than 25% above foreign cement.[4]

Alpha has a delivery advantage over sellers of imported cement in that Alpha can make deliveries upon short notice, whereas customers for foreign cement are sometimes held up on getting deliveries. This is another reason why the Company sometimes can get a little more for its cement.

Alpha did everything humanly possible to get the rail rates to Miami and certain Atlantic and Gulf ports reduced, because such reductions would aid the Company in meeting the price-competition of foreign cement at those points. One rate reduction was obtained from the Birmingham District to the Miami market. The Company was never able to get the rate reduced to the Boston market.[5]

Hercules never has been able to meet the price of foreign cement completely, because foreign cement always has been so low that sales at such prices would be very unprofitable business.[6] The Company cannot abandon the markets where prices have been depressed because of foreign cement, because such markets are its main markets. The Company cannot leave the markets temporarily because once out, it would be impossible to get back in again except at prohibitive cost. There are no new markets available for Hercules today because of freight rates and because of new mills that have been established.[7]

Hercules, in respect to the lower prices which it has quoted in port areas in an effort to meet the competition

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[4] Coogan, Vice President, Alpha (R) Tr. 23837.

[5] Id., Tr. 23968-70.

[6] Brobston, President, Hercules (R) Tr. 26191-93.

[7] Id., Tr. 26193-94.

of foreign cement, has never had any kind of an agreement or understanding with any other respondent concerning such prices. Hercules has, however, made arbitrary prices from time to time in New York and Boston in an effort to meet the competition of foreign trade.[8] The Company has never declined to sell in a market within its marketing area where arbitrary prices have prevailed, because it has not wanted to lose any dealers. It has, however, attempted to limit its sales temporarily.[9]

Keystone has not attempted to meet the prices of imported cement because it has not been able to get down that low. The Company has not considered abandoning the markets where it meets foreign cement because these markets are key distributing points for Keystone. There are no new markets which Keystone can develop since the Company has reached out as far as possible. Keystone has had no agreement or understanding with any other cement company concerning the prices which it has quoted in its trade areas where foreign cement is sold. The Company has not initiated price changes in these areas and has only followed prices initiated by domestic competitors.[10]

Lehigh has found foreign cement prices to be lower than its quoted prices. Lehigh has not met those prices because, when it has attempted to meet them, in every instance the price of foreign cement was further reduced.[11]

Lone Star cement is sold at a higher price than foreign cement at the points where Lone Star comes in contact with foreign cement.[12]

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[8] Brobston, President, Hercules (R) Tr. 26196-98.

[9] Id., Tr. 26198.

[10] Scott, H. M., President, Keystone (R) Tr. 27446-49, 27473.

[11] Bowen, Vice President, Lehigh (R) Tr. 26946.

[12] Koch, Vice President, Lone Star (R) Tr. 32892.

Lone Star, when it found the competition of foreign cement in Boston and in Tampa, Fla. in 1927, did not want to abandon those markets because it had been the Company's experience that once it withdrew from a market, it was too hard to get back in that market again.[13]

Medusa has found that foreign cement has had the effect of lowering prices in Baltimore and the Seaboard markets and also of inviting other manufacturers to solicit business more intensively at markets further inland where cement prices are higher. Medusa has not reduced its prices to the level at which foreign cement is sold because dealers are willing to pay a slight premium for domestic cement.[14]

National has attempted to meet low imported cement prices in Atlantic Seaboard and Gulf markets.[15]

Nazareth has not attempted to meet the prices of foreign cement. They are too low.[16] The Company has never abandoned entirely these markets in which foreign cement has been sold, because it would be too difficult to get back into such markets.[17]

Southwestern has not refused to sell cement to dealers handling Mexican cement.[17a] Instead it has met this competition by producing a cheaper brand of cement.[18] Some Belgian cement was imported at Corpus Christi, Texas in 1928,[19] but Southwestern did not compete with this cement

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[13] Koch, Vice President, Lone Star (R) Tr. 33050-51.

[14] Dawson, Vice President, Medusa (R) Tr. 40073.

[15] Dannelly, Vice President, National (R) Tr. 39593.

[16] Robeson, Vice President, Nazareth (R) Tr. 38140-42.

[17] Robeson, Vice President, Nazareth (R) Tr. 38143.

[17a] Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39136.

[18] Merrill, Vice President, Southwestern (R) Tr. 8862.

[19] Com. Ex. 1274 A-B: Letter 4/17/28, McCourtie, President, Trinity to Powell, President, Southwestern.

Callaghan Company, but the company discontinued handling foreign cement because it was afraid that it would be unable to get domestic cement with which to supply the Works Projects Administration. The Company's President testified that there had never been a time when he could not purchase cement from Coplay.[45]

On November 22, 1933, E. R. Hollander of the Cement Trading Company, a New York City importer of foreign cement, addressed a letter to the Cement Institute, as follows:

> "In view of the prevailing unsatisfactory conditions in respect to the cement industry in the Metropolitan district, I am writing to ask if you would be willing to arrange a meeting among Colonel Rose, National Administrator of the Building Supply Dealers Association, yourgood self and the writer.
>
> It is my belief that something beneficial to all parties might result from such a conference."[46]

On November 25, 1933 Lundborg, Secretary of the Institute, forwarded this letter to C. F. Conn, President, with a letter, stating in part:

> "Mr. Hollander is an importer of cement and from the information I could gather around here, no doubt this letter relates to the fact that the dealers are very much concerned over the fact that foreign cement is competing in New York City, especially on City work at a price lower than they can afford to sell.
>
> I will telephone you about this Monday morning."[47]

There is no further evidence as to this incident.

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[45] Callaghan, Manufacturer of Ready Mixed Concrete (C) Tr. 7620, 7641-46.
Twamley, Vice President, Coplay (C) Tr. 6826-27.

[46] Com. Ex. 812 I.

[47] Com. Ex. 812 H.

b. Respondent's Testimony

Alpha's Vice President explained the Company's policy in regard to selling to dealers handling foreign cement:

"Q. Now did or did you not at the time you adopted the policy which you have described, whereby you refused to sell to dealers in the metropolitan New York area, in the Boston metropolitan area, did you sell to dealers who sold foreign cement? A. For a time we did. And, so far as I can remember, there was only one case where a dealer tendered us an order who was handling foreign cement, and we refused to accept it. There was one case, I think in Boston, where we told the dealer we did not care to take on any business from him, but he never tendered us any order.

We had a rule in effect at all coastwise points. I had first seen it put into effect by a company in New Orleans, Louisiana, the Lone Star Company, I think it was 1926 or 1927, and I watched the development of it, from reports received from that market, and we were favorably impressed with the success they made in handling their business that way. So, sometime in 1932 we put in a rule that where we found a dealer handling large quantities of foreign cement we would not accept orders from him for shipments of our cement.

Q. Well, from what you have said would you say that your company did or did not initiate that policy.

* * *

A. No, it was initiated years before we adopted it.

* * *

Q. Does what you have said with regard to initiating the policy in New York also apply in Boston? Were you the initiator of the policy in either of those ports? A. No. I do not think so. We initiated the policy in neither one of them.

Q. Now again did your company consult any other cement manufacturers before you adopted this policy in New York? A. No, sir. Not before we

adopted it. We knew it had been adopted and we adopted it.'"[1]

Coogan did not know whether one of its men had taken part in watching the yard of Jenney & Lux, of Boston to keep track of shipments of foreign cement. Alpha, however, had instructed its men covering coastwise markets to keep the company posted as to every detail of foreign cement which they came across. For the past twenty-five years Alpha has gathered all the information it could on foreign cement.[2]

Coogan testified:

"Q. Do you know a man by the name of Mr. Heckendorn? A. Yes, I know him.

Q. What is his connection, if you know? A. Well, he is with the Universal Atlas Company; I don't know his position.

Q. Did he discuss this matter with you, Mr. Coogan? A. No, I never discussed this matter with Mr. Heckendorn; in fact, I have only talked to him two or three times, in my whole life.

Q. The reason I asked you that question, Mr. Coogan, the record shows that Mr. Heckendorn discussed this matter with some companies, and I am merely asking you whether or not your company is one of those he discussed it with? A. Well, not so far as I know. Might I make a statement there?

I want it understood that in connection with this matter, while I know that I did not talk to Mr. Heckendorn, I have talked to my competitors about this particular thing. I have gathered every bit of information that I possibly could get which had bearing on the question of foreign cement.

Q. How long has it been your practice to gather all the information you can bearing on foreign cement, Mr. Coogan? A. Well, to my personal knowl-

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[1] Coogan, Vice President, Alpha (R) Tr. 23858-60.

[2] Id., Tr. 23862-63.

edge, since the importation of foreign cement became a serious factor in our business.'"[3]

And again:

"Q. * * * You told us on direct something about your talking with groups of your competitors about the subject of dealers handling foreign cement. Where did such group discussions take place? A. They took—I didn't say—confine it to groups. I said singly and perhaps in groups.

Q. Yes. A. It would occur on the train very often. I would meet two or three of my competitors and we had no discussions whatever until after our own company had adopted the policy of not selling to dealers who were handling foreign cement.

Q. Then what did you discuss with them on that particular subject? A. I simply asked them what experience they were having with it.'"[4]

Coplay about 1933 put into effect a policy of refusing to sell to dealers handling foreign cement. At this time some companies were using this policy and others were not. Although some companies used the policy, it was not used to the extent that a scarcity of American cement obtained. Dealers during this period could get all the cement they desired from companies such as National of Philadelphia.[5]

Twamley, Vice President of Coplay, explained his company's use of this policy as follows:

"Q. Did you issue any instructions to your sales representatives to report the names of dealers who were handling foreign cement? A. I believe we did; yes, sir.

Q. What did you do with such information after you got it? A. Well, I do not remember that we ever used it to decrease our sales. Our salesmen were instructed not to solicit business from those who were

[3] (R) Tr. 23865-66.

[4] (R) Tr. 24287.

[5] Twamley, Vice President, Coplay (C) Tr. 6812-16.

handling foreign cement, but we never had the necessity of refusing orders, because the solicitation apparently of other manufacturers, filled the gap, and with our suspending solicitation of those accounts—they just simply dropped out. However, there were very few, I believe, of our customers, that today handle foreign cement.'"[6]

Twamley explained the manner in which Coplay discovered what dealers were handling foreign cement. He testified:

"Q. How did your salesmen find out what dealers were handling foreign cement? A. Our salesmen are supposed to be in pretty close touch with our customers. They call at their offices; they see their trucks going out and coming in; every one of our salesmen I believe can tell you the brand of cement that their dealers handle principally.

Q. Did any of your salesmen watch warehouses to see what dealers' trucks took foreign cement out of them? A. They may have done so.

Q. Did you ask them to do so? A. That may have been the case. We asked them to get information as to who is handling foreign cement. That might have been one of the methods adopted.'"[7]

Coplay did not impart information as to dealers handling foreign cement to any other cement manufacturer or to The Cement Institute.[8]

Edison, although it never initiated such a practice, at one time adopted a policy of refusing to sell cement to dealers handling imported cement. On January 9, 1933, Edison issued the following directions to its salesmen:

"Effective at once, we will not sell any dealer who handles foreign cement. Please notify your trade to this effect. If any business is offered you

[6] Twamley, Vice President, Coplay (C) Tr. 6815-16.

[7] Id., Tr. 6816-17.

[8] Id., Tr. 6815.

from such dealer, decline it, and advise us fully what conversation resulted.

I want each of you men to send me immediately a list of the dealers in your territory that you know are handling foreign cement at this time, and advise me promptly from time to time the names of other dealers in your respective territories who handle foreign cement, as this is developed by your calls, also the names of such dealers as have in the meanwhile discontinued handling foreign cement, so that we can re-establish them on our mailing list. This is of the utmost importance.

I also want Messrs. Brennan and Lyons to advise at once what stocks of foreign cement are carried at the seaboard terminals in their respective territories, with the fullest information obtainable as to brand, quantity, where stored, how fast it is moving out of stock, and whether or not any additional cargoes are on the way. Please check these stocks at least once a week, and advise me status.'"

Sweeney explained Edison's adoption of this policy as follows:

"Q. Will you tell us the reason for that policy, and why your company adopted it? A. We had been troubled to a very large extent because of imported cement in the New York and Boston areas in particular, and were rapidly losing ground. When we discovered that one of our competitors had adopted a policy of declining to sell dealers who handled foreign cement, considering them in a sense competitors, we thought that was a good policy, and that it might, at least in some measure, help the situation as far as we were concerned in those areas; so we adopted a similar plan.

Q. Do you have any such policy as that today? A. No, we do not.

Q. How long has it been since you had the policy? A. We had not had that, I will say, for five years.'"[16]

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[15] Com. Ex. 1170.

[16] Sweeney, Vice President, Edison (R) Tr. 35767-68.

Edison's policy in respect to dealers handling foreign cement was not adopted through any understanding or agreement or arrangement with any of its competitors.[11]

Government agencies influenced dealers against handling foreign cement because such agencies were good customers of the dealers. Government authorities at one time issued an order which prescribed the use of domestic materials if the difference in price was not more than 15%. Later this differential was increased to 25%.[12]

Hercules has never had any agreement with any manufacturer to watch Jenney & Lux of Boston. About the time that firm was being watched, Hercules had a policy of not selling cement to dealers handling foreign cement. Hercules' salesmen were instructed to report to the company whether dealers handled foreign cement in the same way the salesmen reported to the company what domestic brands the dealers handled. The Company adopted its policy in respect to dealers handling foreign cement because dealers not handling foreign cement were strongly in sympathy with such a policy, and because Hercules received a good many complaints from such dealers about their competitors who could furnish both foreign and domestic cement. Some of Hercules' dealers did not approve of this policy, but they were in a minority.[13] Another reason for this policy was that the Company felt that if dealers also had foreign cement in stock it was bad for the company's business because such dealers could substitute foreign cement.[14]

[illegible]Sweeney, Vice President, Edison (R) Tr. 35769.

[11] Callaghan, Manufacturer of Ready Mixed Concrete (C) Tr. 7644-45, 7667.
Coogan, Vice President, Alpha (R) Tr. 23837, 24703-85.
Harkness, Florida State Procurement Officer, Proc. Div., U. S. Treas. Dept. (C) Tr. 4925.

[12] Brobston, President, Hercules (R) Tr. 26199, 26203-04.

[13] Id., Tr. 26205.

Hercules abandoned its policy in respect to dealers handling foreign cement when it found that a number of its competitors were selling to such dealers and Hercules didn't want its own trade to suffer, and because the policy proved ineffective.[15]

At the time Hercules had this policy in effect it did not consider that it was maintaining a boycott in any way, shape or form. The Company's President testified that he felt that the company was exercising its right to determine whether selling to a certain customer would be an injury to business or a help to business. There was no collusion whatsoever in respect of Hercules' use of the policy.[16] The Cement Institute had nothing whatever to do with Hercules' policy toward dealers who handled foreign cement.[17]

Keystone at one time declined to sell cement to dealers who traded in foreign cement. This policy was in effect during 1933 or 1934 or 1935. The policy was adopted because the company had learned that Lone Star in New Orleans had employed a similar policy and had learned that it had worked pretty well for Lone Star. The Company also had learned of similar policies in the East. Keystone adopted the policy because dealers handling foreign cement were definitely becoming competitors of Keystone, and during 1933 and 1934 the Company was down to a pretty low level of business in trying to keep its plants going.[18]

Keystone's discontinuance of this policy was explained by its President as follows:

"Q. Do you have that policy today? A. No, sir; I do not:

* * * *

[15] Brobston, President, Hercules (R) Tr. 26205.

[16] Id., Tr. 26206.

[17] Id., Tr. 26208.

[18] Scott, H. M., President, Keystone (R) Tr. 27450-51.

Q. When did you discontinue it? A. I think probably about the latter part of 1935.

Q. And why? What was the reason for discontinuing that policy? A. Well, there were other manufacturers who made American cement available to these same dealers with foreign cement, who were handling foreign cement. I have in mind particularly the National Company, who seemed to be closely allied with a certain amount of foreign cement, or a certain kind of foreign cement coming in, and our policy simply was not operative, was not effective.

Q. Did you ever have any understanding with any of your competitors about that policy, Mr. Scott? A. No, sir.'"[19]

In connection with the alleged boycott the same witness testified:

"Q. Do you know anything about a so-called blacklist, that has been mentioned in the record, here, Mr. Scott? A. No, sir.

Q. Did you ever see a so-called blacklist? A. No, sir.

Q. Did you ever hear of one in the business? A. No, sir.

Q. Did any of your salesmen follow dealers' trucks to see where they were obtaining or delivering cement, Mr. Scott, to your knowledge—as far as you know? A. Well, not that I know of. There would be no particular reason for them following trucks.

Q. Well, did you issue any instructions that salesmen should follow dealers' trucks, for that purpose? A. No, sir.

Q. In the years that we were just discussing, Mr. Scott, how did the dealers who handled foreign cement compare with the dealers who did not, in number, as far as your company is concerned?

* * *

A. The ones who did not handle foreign cement were greater in point of our total number of dealers.'"[20]

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[19] Scott, H. M., President, Keystone (R) Tr. 27451-52.

[20] Id., Tr. 27453-56.

Keystone, in adopting its policy of declining to sell to dealers handling imported cement, did not understand that it was boycotting those dealers. The Company regarded it as a question of not wanting to help competitors, thereby taking work away from Keystone's workmen, and as a question of a choice of customers.[21] The Cement Institute had nothing to do with Keystone's policy toward dealers handling foreign cement.[22]

Keystone never had any agreement with any other manufacturer to watch Jenney and Lux.[23]

Lehigh first adopted a policy of declining to sell cement to dealers handling imported cement in January 1933. In a letter, dated January 6, 1933, Lehigh issued the following instructions to its New York managers:

> "During the past few days your salesmen have reported that they are finding some cement manufacturers notifying the trade that dealers handling foreign cement will be considered as competitors and that they will decline to sell their product to such dealers so long as these dealers are selling the foreign products.
>
> • • • •
>
> Effective immediately, we will adopt the same policy. Please explain to the various dealers concerned that this step is taken as the only means open to us for defending our position and for cooperating with the many dealers whose loyalty has been shown by their refusal to handle foreign cement.
>
> It will be entirely in order for you to admit frankly to any dealer that we are following the policy established by other manufacturers because we think it sound from the standpoint of both the dealers and ourselves. We do not know that other manufacturers will see fit to adopt the same policy and whether they do so or not will have no bearing on our own course.

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[21] Scott, H. M., President, Keystone (R) Tr. 27458.

[22] Id., Tr. 27461.

[23] Id., Tr. 27463.

petition in our local territory. We also wish to assure you that it is not our wish or intention to handle Foreign Cement if the competition is discontinued."[26]

The witness testified that this letter was not sufficiently specific to permit his company to purchase domestic cement, and Elcock dictated another letter over the telephone, addressing it to himself.[27] This letter, referring to the telephone conversation, states:

"Confirming my conversation with you we have decided not to handle any more foreign cement.

We have in stock at the present time approximately 6,000 bags; this represents our last importation."[28]

Despite this letter, Universal Atlas did not immediately fill the witness' orders, and informed him that they were working on the letter and endeavoring to see what they could do. Elcock told him that he was trying to persuade the other cement manufacturers to allow the witness' company to buy domestic cement.[29] The witness testified:

"Q. Did Universal Atlas fill orders that you sent them after you wrote this letter? A. No, they did not.

Q. Did they indicate that they would? A. They said that they were working on the letter that I had written to them and were endeavoring to try and see what they could do.

Q. Working on it how and with whom?

* * *

The Witness: He stated to me that he was working with the rest of the domestic Portland

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[26] Com. Ex. 1177.

[27] (C) Tr. 7724-27.

[28] Com. Ex. 1176.

[29] (C) Tr. 7728-29.

cement manufacturers in this area, to try and persuade them the fact that we could go back and buy domestic cement.

* * *

Q. Did the representative of the Universal Atlas and other cement companies notify you that you could buy it from them after that? A. No, they did not.'"[30]

Upon direct examination, the witness testified that he visited various representatives of the different domestic manufacturers in New York City during the first six months of 1935 and was unable to purchase domestic cement.[31] Upon cross-examination, however, he admitted that this may have occurred six months earlier.[32] Also, on direct examination, he testified that six or eight months elapsed before he received a phone call from Elcock, informing him that the witness had been removed from the black list and that he could buy domestic cement. By noon of that day representatives from about a dozen cement companies called the witness' dispatcher and gave him the same message.[33] The following day the witness spoke personally to T. F. Burke of Lehigh and Dan Long of Penn-Dixie, both of whom verified the report that he was no longer on the black list.[34] While still under direct examination, the witness contradicted this statement,[35] stating that he was able to purchase cement within two weeks after his second letter to Elcock. Upon cross-examination, he preferred the

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[30] (C) Tr. 7728-29.

[31] (C) Tr. 7730.

[32] (C) Tr. 7778-79.

[33] (C) Tr. 7730-32.

[34] (C) Tr. 7732.

[35] (C) Tr. 7751-53.

second version,[36] but stated that the time was three weeks.

The witness testified that when Elcock stated that the latter would "submit" the statement "to his interests",[37] Elcock explained that he was referring "to the manufacturers."[38] He further testified as follows:

> "Mr. Elcock stated this to me. He stated to me that the manufacturers were going to hold a meeting and they would be glad to submit my statement.
>
> *By Mr. MacIntyre:*
>
> Q. Did you understand that he was securing a statement for such purpose? A. Exactly."[39]

He further testified as follows:

> "Q. Mr. Ryan, as to what you understood Mr. Elcock was going to do, he told you there was going to be a meeting of manufacturers, did he? A. That is what he told me, yes.
>
> Q. Did he tell you where the meeting was going to be held? A. In New York City.
>
> Q. When was that? A. Following my second letter.
>
> Q. Soon after your second letter? A. That is right.
>
> Q. Did he tell you who was going to attend the meeting? A. No, he did not.
>
> Q. So he just came in and told you that they were all going to have a meeting together? A. He did not use the word 'all'. He just said that various cement manufacturers were going to sit down at a meeting.
>
> Q. He told you that? A. Yes.
>
> Q. Did he tell you that they were going to come to an agreement or an understanding as to what

[36] (C) Tr. 7779-81.

[37] (C) Tr. 7725.

[38] (C) Tr. 7801.

[39] (C) Tr. 7804.

they, the manufacturers, would do? A. He said that the affidavit would be submitted and that they would act on it that day.'"[40]

Elcock, Vice President of Southern States, admitted that he knew Mr. Ryan, and stated that he had discussed Universal Atlas' policy concerning imported cement with him.[41] He identified Com. Ex. 1176 as a letter dated January 3, 1935 which he received from J. J. Ryan. He did not recall, however, that there was a meeting of the manufacturers on the subject of foreign cement in New York. It is likely that the witness told Ryan that the latter should write him a letter stating that he would no longer handle foreign cement, since the witness would not believe him otherwise.[42]

S. V. Duffy, an official of J. P. Duffy Co., Brooklyn, New York dealers, testified that representatives of respondents demanded to know where his drivers were going and had cement salesmen watch the trucks and follow them.[43] J. P. Duffy Co. sent orders for domestic cement with certified checks to Alpha, Nazareth and Penn-Dixie in December 1933 and January 1934. The orders and checks were returned by respondents and the reasons for rejection stated.[44]

Callaghan, a dealer in Harrison, New Jersey stated that his customers were checked by several producers as to whether imported cement was being handled. These producers included Universal Atlas, Edison and Penn-Dixie. Lone Star did not watch the warehouses of the Callaghan Company. Manufacturers did not write or threaten the

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[40] (C) Tr. 7805-06.

[41] (R) Tr. 37554.

[42] (R) Tr. 37555-56.

[43] (C) Tr. 7920.

[44] Com. Ex. 1141 A-F; Letters of rejection from respondents to J. P. Duffy Co.

office that it was their responsibility to ascertain what dealers were handling imported cement in order that our policy might be made effective, just as we stated it. It was up to Boston to get that information both on domestic and foreign cements, just as our salesmen in our territory ascertained what brands of cement the dealer was handling, and reported the information to us.

• • •

Q. Did the instructions which you have just described include or even contemplate, shall we say, salesmen following dealers' trucks? A. Well, the instructions to Boston gave them considerable latitude as to the collection of the information. I should explain that the situation in Boston was quite different from the situation in the New York Market.

In the New York market at that time the dealers who were buying imported cement were buying it in large quantities. Cement was unloaded direct from the steamers to lighters and delivered directly to the dealers' warehouses.

In Boston, however, the imported cement at that time was stored all at one location, which was a warehouse at the army base at Boston, but in Boston the dealers did not ordinarily stock the imported cement in their warehouses but sent the trucks to the army base and delivered from the importers' stocks directly to the point of use. It was necessary, therefore, in Boston, in order to get the information, to observe the deliveries of cement from the place of storage just as in other places the dealers' warehouse is the point from which the deliveries are made.'"[21]

Lone Star first adopted its policy of refusing to sell to dealers handling imported cement at its plants in Argentina, Cuba and Uruguay during the period from 1922 to 1924. At that time, the company found this policy beneficial. Lone Star first used the same policy in the United States in 1926.[22]

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[21] Bowen, Vice President, Lehigh (R) Tr. 26961-62.

[22] Koch, Vice President, Lone Star (R) Tr. 32895-907.

Lone Star was repeatedly approached by dealers for action when the problem of foreign cement became very acute in Boston in 1925 and 1926. The Company put in a reduced price at Boston and also put out a notice that it considered an importer, user or handler of foreign cement, a competitor, and, therefore, would not sell him Lone Star cement. Competitors at this time followed Lone Star's price but did not follow the Company's policy in this respect.[33]

Koch of Lone Star explained the origin of this policy of the company as follows:

> "Q. Mr. Koch, in 1926, did dealers make any request of your company with regard to action which they thought you should take in connection with the importation of cement by your customers? A. They wanted help from us to protect their sales on domestic cement to the user.
>
> Q. And did customers write to you covering that subject? A. They did.
>
> • • •
>
> Q. Mr. Koch, after you sent out your announcements in November of 1926, what was the reaction of your dealers in so far as it was expressed to you? A. My recollection is that it was favorable to the majority. There were a few that felt otherwise."[34]

After its adoption of its policy in respect of dealers handling foreign cement, Lone Star found it necessary in carrying out its policy to refuse to sell to two customers. These were the Portland Stoneware Company of Boston, Mass. and the Booker Company of Tampa, Fla. Both refusals to sell were during the year 1927.[35]

In 1932, when Lone Star first encountered foreign cement in New York, the company used its policy of refusing

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[33] Koch, Vice President, Lone Star (R) Tr. 32895.

[34] Id., Tr. 33039-44.

[35] Id., Tr. 33048-49.

to sell to dealers handling imported cement, although many of Lone Star's competitors were not following this policy with their dealers.[36]

On December 31, 1932, Lone Star stated the following terms of sales to the official in charge of its sales in the New York area:

[Italicized part quoted in Fdgs. Par. Nineteen (b)]

"In keeping with our past performance in other sections of the country, our company has reached the conclusion that in the Metropolitan District, which includes northern New Jersey, you should place in effect immediately the policy of classifying building material dealers who handle foreign cement as competitors and, as such, decline to sell them Lone Star or 'Incor' until such time as it can be shown that they have discontinued handling foreign cement and give their assurance that no additional foreign will be handled in the future.

We must take into consideration, however, that at present there is some foreign cement in New York, possibly some in the dealers' warehouses, and in our relations with the dealer we must recognize that the foreign cement which he now has he is entitled to dispose of. We are perfectly willing that he shall dispose of his present stocks of foreign cement but should any dealer undertake to purchase additional stocks, then we must take action promptly.

There is another feature which must be given consideration and that is the claim which is likely to be made by dealers that they now have themselves obligated for foreign cement which will be delivered in the future. This we cannot consider. If they have foreign cement purchased and on the seas we must consider them in the light of a competitor and take the action referred to above.

There is still another feature and that is the claim on the part of dealers that they have obligated themselves on a specific piece of work which will take delivery over a specified period of time and predicated their bid on the use of foreign cement.

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[36] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6552-53.

This, too, we cannot consider and again we should take action.

Please arrange to have Mr. Bradley watch as closely as possible the known foreign cement deposits in this town. Likewise instruct the representative of the Lone Star Cement Company Pennsylvania covering northern New Jersey to watch the deposits in and around Newark and other known points with a view to determining whether or not any dealers are drawing cement from these deposits.

The Brooklyn deposits we understand are in lower Brooklyn and at Bohack Terminal. In New Jersey we understand there are one or more deposits at Newark or Port Newark. These should be definitely developed and watched and periodical reports made showing what dealers are drawing cement from the warehouses from time to time.

* * *

Please have the salesmen watch closely and report promptly any evidence indicating that dealers in their territory are handling or contemplating the use of foreign cement. This is the only means known to us which will give us an opportunity of protecting our interest. We must avail ourselves of it to the fullest extent."[37]

On January 4, 1933, Lone Star issued supplementary instructions to this effect:

"I would like to know immediately how much foreign cement is known to be in this market, either in dealers' stocks or in stocks maintained by importers. Please send me a report at once, giving me all the information you have and can secure on this particular feature.

We will watch all orders carefully and will probably take up with you various orders which come to us from time to time. In the meantime, in addition to giving us the information regarding the

[37] Com. Ex. 1132 A, B. Neylan, Asst. General Sales Manager to McConnell, Vice President.

stocks of foreign cement, please send us a list of dealers to whom shipments should not be made.'"[38]

Information gathered by Lone Star's salesmen as to dealers handling foreign cement was not made available to Lone Star's competitors.[39] Lone Star would decide whether to apply its policy of refusing to sell cement to dealers handling foreign cement after it had received reports from its salesmen as to such dealers.[40]

A typical example of the manner in which Lone Star treated dealers who continued to handle foreign cement is illustrated by its letter to Waldo Brothers, Boston, Massachusetts, dated August 14, 1934. The letter stated in part:

"On November 1, 1926 we notified all building material dealers that future sales of our products would be confined to those dealers who in turn confined their efforts to domestic cement. This letter was followed by our booklet entitled 'Importing Foreign Cement and Exporting American Prosperity', which was given a wide circulation in all territories served by our mill.

We feel that ample and sufficient notice of our position has been given to the trade, and we now feel that our first obligation is to those dealers who have served us, or at least have continued to do business with the American cement industry, rather than those who have engaged in the importation of cement produced under conditions that are far below the American standard of living.'"[41]

Medusa has never refused to sell a dealer cement because he handled foreign cement.[42]

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[38] Com. Ex. 1133 C: Memo to all salesmen.

[39] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6558.

[40] Id., Tr. 6558-59.

[41] Com. Ex. 1179 B.

[42] Dawson, Vice President, Medusa (R) Tr. 40078.

National's dealers have sold imported cement, but the Company never has refused to sell to a dealer because he sold foreign cement.[43]

Nazareth's Vice President testified:

> "Q. Did your company do anything, and, if so, what, in adopting a policy to try to meet this situation? A. Well, in early 1933 we had called to our attention in the New York market that there were a number of companies that had adopted a policy of refusing to sell dealers who handled foreign cement. We studied the effects of that policy. Many of the customers we were selling seemed to be quite pleased with it, and asked us whether or not we were going to adopt a similar policy. We felt there was a certain amount of good will involved in adopting it, and we adopted the policy in January, 1933.'"[44]

Nazareth did not put its new policy into effect against dealers who had stocks of foreign cement on hand. The company allowed the dealer ample time in which to move his stock, but if he ordered new supplies of foreign cement, Nazareth refused to sell to him.[45] Nazareth made its policy effective originally in the New York area, and after reasonable success with it there, made it effective in the New England area.[46]

Nazareth did not understand that it was boycotting dealers by its use of the policy. The policy was arrived at independently and no understanding or agreement of any kind was made with any competitor with respect to what Nazareth would do or not do in either selling or refraining from selling cement to dealers handling foreign cement.[47]

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[43] Dannelly, Vice President, National (R) Tr. 59593.

[44] Robeson, Vice President, Nazareth (R) Tr. 28145-46.

[45] Id., Tr. 28154-55.

[46] Id., Tr. 28157.

[47] Robeson, Vice President, Nazareth (R) Tr. 28158-59.

Nazareth's Vice President testified that the company abandoned its policy of refusing to sell to dealers handling foreign cement in the latter part of 1936 and explained this abandonment as follows:

> "Q. What were the reasons which led you to do that? A. Well, we found the very dealers who were quite enthusiastic about the policy when it first came into being were handling foreign cement, and we found that a number of our competitors who at one time seemed to have such a policy, they seemed to be selling people who were handling foreign cement, and we finally decided that there was no good will to be gained by staying with the policy, and were probably losing some tonnage, so we met the competitive situation and just went out and offered to sell anybody."

Prior to the abandonment of this policy, Nazareth never knew of, or heard of a "black list" of dealers handling foreign cement.[48]

Nazareth's employee, Foster W. Barber, watched the warehouse of Jenney & Lux, but he was acting under company instructions only in so far as every field salesman of Nazareth was instructed to keep the company informed at all times of what brands of cement Nazareth's dealers were handling.[49]

Whitehall never participated in a boycott and never refused to sell to dealers handling foreign cement,[50] although the company finds the competition of foreign cement in New York, Boston, Baltimore, and Richmond and sells between 70% and 75% of its cement in such areas.[51]

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[48] Robeson, Vice President, Nazareth (R) Tr. 28159-60.

[49] Id., Tr. 28163.

[50] Elliott, Vice President, Whitehall (R) Tr. 28532, 28534-35.

[51] Id., Tr. 28530.

The Institute had nothing whatever to do with the policy of the producers in refusing to sell cement to dealers handling foreign cement.[52]

Manufacturers did not agree with competitors not to sell cement to dealers handling imported cement.[53] The policy of refusing to sell to dealers handling foreign cement was gradually abandoned in 1935 and 1936 because dealers felt themselves under the necessity of selling imported cement and because they found that they also could get adequate supplies of domestic cement.[54]

Twamley, Vice President, Coplay testified that his company never refused to sell to dealers handling imported cement, but declined to solicit such dealers.[55]

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[52] Brobston, President, Hercules (R) Tr. 26208.
Coogan, Vice President, Alpha (R) Tr. 23863, 24287.
Porter, President, North American (R) Tr. 33875.
Scott, H. M., President, Keystone (R) Tr. 27461.
Twamley, Vice President, Coplay (C) Tr. 6816.

[53] Coogan, *supra*, Tr. 23860.
Sweeney, *supra*, Tr. 35769-71.
Scott, *supra*, Tr. 27452.
Bowen, Vice President, Lehigh (R) Tr. 26973.
Robeson, Vice President, Nazareth (R) Tr. 28159.
Porter, President, North American (R) Tr. 33874-75.
Elcock, Vice President, Southern States (R) Tr. 3[illegible]56.

[54] Bowen, Vice President, Lehigh (R) Tr. 26965-66.
Brobston, President, Hercules (R) Tr. 26205.
Coogan, Vice President, Alpha (R) Tr. 23867-68.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6560, 6572.
Robeson, Vice President, Nazareth (R) Tr. 28159.
Scott, H. M., President, Keystone (R) Tr. 27451-52.
Sweeney, Vice President, Edison (R) Tr. 35768, 35770.

[55] (C) Tr. 6825.

3. Placement of Stocks at Points Accessible to Dealers

Coplay at one time put in a stock of cement in Brooklyn to meet the competition of foreign cement. The company discontinued this stock and has never since restored it.[1]

Edison's Vice President testified:

> "Q. Apart from this policy which we have been discussing, has your company taken any further action in an effort to meet the foreign cement competition? A. Well, for a short period—I believe it was in 1935—we learned that some of our competitors had established stocks of cement in Brooklyn, in close proximity to where the foreign cement was coming in, and that they were offering this cement to dealers, who would come there with their own trucks, at a special price, which, as I recall it, was some twenty-five or thirty cents off the price which we had been quoting at that time. We thought that this method might help us to regain some of our lost business in that area, and we adopted a similar policy by establishing a stock of Edison cement in the neighborhood for that particular reason.
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> • • •
>
> Q. Well, when you established this stock of cement in Brooklyn, did you obtain a warehouse there, or how did you go about it? A. No; we had no warehouse. We brought the cement in on cars and placed those cars on the railroad siding, the Lackawanna Railroad siding, at Twenty-fifth Street, on a truck siding, and put a man in charge of it, who expedited the loading of dealers' trucks.
>
> Q. Now, was that stock established in Brooklyn by your company in any sense as a cooperative measure with your competitors? A. No, sir; it was not. It was done selfishly to help us to get our own lost business back."[2]

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[1] Twamley, Vice President, Coplay (C) Tr. 6824.

[2] Sweeney, Vice President, Edison (R) Tr. 35770-71.

Hercules learned from its salesmen that its competitors had established stocks of cement in Brooklyn. Hercules also established a stock of cement in Brooklyn in July 1935 for the purpose of meeting the foreign competition the company found in New York. Brobston, the President, explained this action as follows:

"Q. Were you attempting to meet the competition of foreign cement, or were you attempting to go beyond it? A. Well, I would say that in this particular case we were just meeting the competition of domestic cement. These domestic stocks were put in, and we met their prices, and, unquestionably, it was for the purpose of meeting foreign competition.

Q. Well, you say you met the competition—do you mean—or, tell us what you did. Did you put cement there on the dock just the same as the foreign cement, or did you meet them, the competition, in that way, or did you merely meet their prices I mean, as to the availability of the cement,—as I understand it, there was certain foreign cement there on the dock? A. Well, foreign cement comes in and is delivered on the dock.

Q. Yes. A. And the dealers that want it have to truck it away. Now, this cement was put down on the theory that this was the same method in which foreign cement was delivered there.

Q. I see. A. And that the dealers at this low price should only get the same service that they could get from foreign cement.

Q. So, then, you didn't only meet the price but you met the other conditions of competition? A. We——

Q. The availability? A. I don't even know that we met the price, Mr. Leisure,—whether the price was as low as foreign cement, I couldn't tell you. It was much lower than our other price.

Q. You do know, do you, that the purpose of putting the cement there was to meet the competition? A. Oh, that was the purpose. There is no question about that, and we tried to meet the conditions as well as we could.

Q. Well, now, as to price; what were your reasons for not going beyond it? A. How do you mean? Not going lower than we did?

Q. Yes. A. We didn't want to go any lower than we had to. We didn't want to lose any more money than necessary.'"[3]

Hercules was not the first company to discontinue its stocks in Brooklyn. Brobston explained the company's withdrawal as follows:

"Q. Then why did you withdraw your stocks? A. There were several reasons. Of course, we didn't find that, keeping out foreign cement, to begin with, and these very stocks, we found trucks were coming in from all over northern New Jersey and taking these stocks, which upset our dealer business in northern New Jersey very much, and it hadn't accomplished the purpose for which it was put in. The result was when we found other people were withdrawing their stocks, we withdrew ours. I think we were a day or so late. We had quite a bit of cement there, and it took some time to dispose of it.

Q. Did you have any contacts with your competitors prior to that time that you established this stock which influenced your action? I mean, did you agree with them to do it, or have any kind of arrangement with them that you would act in concert with them on this? A. I did not."[4]

Hercules, since its withdrawal of the special stocks in Brooklyn, has had only the policy of discouraging customers from using foreign cement. The company continues to sell to people handling foreign cement. One of Hercules' arguments for discouraging customers from using foreign cement is that Hercules cement has a very decided advantage because its cement can be held in bins and tested in laboratories. Where it is required that cement be tested in

[3] Brobston, President, Hercules (R) Tr. 26212-17.

[4] Id., Tr. 26218.

laboratories and held in bins, foreign cement is not desirable. In addition, Hercules can deliver all of the cement required promptly, whereas the supply of foreign cement is spotty.[5]

Keystone put a stock of cement in Brooklyn in 1935 to parallel the competition of other domestic companies who had established stocks there to compete with foreign cement. The company learned of its competitor's activities through dealers and salesmen and through the filing of such information with the Code Authority. At this time, Keystone sought to meet the competition of foreign cement from every standpoint. It did not seek to withdraw from this market because it desired to maintain its position with dealers in the area.[6]

Keystone discontinued placing stocks of cement in Brooklyn when it discovered that North American and Universal Atlas, which were large distributors via the Hudson River, were discontinuing their stocks. The company did not want to sell one more barrel through the Brooklyn stock than was necessary to maintain its trade in that area, and so it promptly discontinued its stocks there at that time. Keystone never had any agreement or understanding of any kind with any of its domestic competitors regarding the establishment or discontinuance of stocks in Brooklyn.[7]

Lehigh's Vice President explained his company's policy with respect to the Brooklyn stocks as follows:

> "Q. Now, you have told us about your policy and methods of meeting foreign cement. What, if any other methods, did you use in New York to combat imported cement—that is, other than those methods to which you have already referred? A. In the summer of 1935 we found that one of our competitors had established stocks of cement at Brooklyn

[5] Brobston, President, Hercules (R) Tr. 26219-20.

[6] Scott, H. M., President, Keystone (R) Tr. 27463-69.

[7] Id., Tr. 27469-72.

> Our position is that the dealer who handles foreign cement is in reality our competitor, and as such we cannot see our way clear to sell him Lehigh cement.
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> • • •
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> Please give your special attention to watching future arrivals and deliveries of foreign cement and be sure to keep us fully informed of all developments bearing on this situation."[24]

The Company had first become acquainted with this method of combating imported cement several years earlier when it found one of its competitors, Lone Star, observing a similar policy around New Orleans. Although Lehigh competed with Lone Star in the New Orleans area the company did not follow Lone Star's policy at that time. Lehigh's first use of the policy was in the New York area. Some six months later the same policy was applied in the Boston area, because Lehigh felt the policy was working to its advantage in the New York area. The company was not the first to adopt the policy in Boston.[25]

Lehigh's first knowledge of the use of this policy in the New York area came from dealers. Because of the favorable attitude of the majority of dealers toward the policy Lehigh felt that its competitors would gain a substantial advantage over Lehigh unless the company also adopted the policy.[26] Bowen, Vice President of Lehigh, explained the attitude of dealers in favor of the policy as follows:

> "A. We found that a good many dealers not having foreign cement because in a great many cases they found that the imported cement was not acceptable to their trade—in those days there was considerable feeling among consumers that the foreign material was of questionable quality, it was not suitable for some kinds of work.

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[24] Com. Ex. 1171.

[25] Bowen, Vice President, Lehigh (R) Tr. 26956-58.

[26] Id., Tr. 26958-59, 26963-64.

> Well, I think the principal reason why a great many dealers were loathe to handle foreign material was because they had no really dependable source of supply. Those dealers were dealers who took a great many contracts for future delivery, commitments for specific work, and they found that if they attempted to make those commitments on imported cement, and at the price applying to imported cement, they did not have a sufficient assurance that the material would be available when needed to enable them to make their commitments good."[27]

Lehigh asked the Liberty Coal & Cement Company not to handle any more imported cement. When the Liberty Company informed Lehigh that it was no longer buying imported cement, Lehigh thereafter sold cement to the Liberty Company. Later, when Lehigh found the Liberty Company again using imported cement, the Company again refused to sell cement to Liberty.[28]

Lehigh discontinued its policy of refusing to sell cement to dealers handling imported cement in December 1935 because, while the policy was quite successful when first used by Lehigh, more and more dealers felt themselves under the necessity of buying imported cement, and as they found that they could still get domestic cement, Lehigh found the policy working to its disadvantage.[29]

Lehigh at no time had any understanding or agreement with its competitors concerning its policy of refusing to sell to dealers handling foreign cement.[30]

Lehigh's Vice President testified:

> "Q. What, if any, steps did the Lehigh Company take to find out whether a dealer was handling imported cement, Mr. Bowen? A. We told our Boston

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[27] Bowen, Vice President, Lehigh (R) Tr. 26964-65.

[28] Id., Tr. 26959-60.

[29] Id., Tr. 26965-67.

[30] Id., Tr. 26973.

Redwood Harbor	2,000,000 barrels
San Juan Bautista	750,000 barrels

The San Juan Bautista mill has not been in operation since 1930.[4]

Pacific's normal sales area comprises northern and central California, as far south as Bakersfield (the principal market), southern California (principally specialty cements), Hawaii, Oregon, Western Nevada, and Washington (only a few shipments). Sales and shipments to continental purchasers in States other than California average approximately 14 percent of the total sales and shipments, and the sales and shipments to Hawaii average approximately 8 percent of the total sales and shipments.[5]

The principal competitors of Pacific are the following:

Northern and Central California and Western Nevada	Oregon	Hawaii	Southern California (principally specialty cements)
Cowell	Beaver	Santa Cruz	Santa Cruz
Calaveras	Oregon	Monolith	Monolith
Yosemite	Calaveras	Riverside	Riverside
Santa Cruz	Yosemite	California	California
Monolith	Santa Cruz	Southwestern (Victorville)	Southwestern (Victorville)
	Monolith		

Competition with companies other than those named is sporadic and negligible.[6]

Yosemite was organized on December 15, 1924. Its principal office is located at Merced, California, and its main sales office in San Francisco. All cement sold by Yosemite is manufactured at its one plant which is located about 1½ miles northwest of the City of Merced. It has a capacity of approximately 2,700 barrels per day and has

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[4] Canvin, Secretary, and Downing, Director of Sales, Pacific (R) Tr. 42835-36; Com. Ex. 3166 G. Fdgs., Par. One (3a).

[5] Id., Tr. 42836.

[6] Id., Tr. 42836-38.

been in operation since about 1927. More than 97 percent of Yosemite's products are sold in northern and central California and the remainder in southern Oregon and western Nevada.[7]

Yosemite sells in competition with the other cement producers in northern and southern California and with Beaver and Oregon.[8]

Santa Cruz was organized on June 2, 1905. Its stock is owned by more than two hundred separate stockholders, none of whom is connected with any other cement company. It has been under the same management for more than 10 years. Its principal office is located in San Francisco. Branch offices are located at Stockton, Sacramento, Santa Rosa, San Jose and Fresno, California, and Portland, Oregon.[9] All cement sold by Santa Cruz is manufactured at Davenport, Santa Cruz County, California, where its plant and its deposits of raw material are located. The plant has been in operation since May, 1907 and has a daily capacity of approximately 10,000 barrels. It was located at Davenport to take advantage of the rail and water facilities available for shipping and for incoming supplies. The rock deposit is regarded as one of the most available in California, due to its extent and its proximity to water and rail transportation and consuming markets.[10]

When Santa Cruz first began shipments, cement was distributed as far north as British Columbia and as far south as the State of New Mexico, being sold in competition with cement imported from points outside the United States, and rail shipments were made as far

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[7] Van Slyke, Secretary, Yosemite (R) Tr. 42843-44; Com. Ex. 3157 G; Resp. Ex. 2520.
Fdgs., Par. One (4a).

[8] Id., Tr. 42845-46.

[9] Gay, Vice President, Santa Cruz (R) Tr. 42858-59.

[10] Id., Tr. 42860, 42863; Com. Ex. 3140 D; Resp. Ex. 3764 A.
Cf. Fdgs., Par. One (3h).

east as Colorado, the latter in competition with cement being shipped from Kansas and points further east. As time went on Santa Cruz was compelled to restrict its shipments to points nearer its mill owing to the competition of plants more advantageously located with regard to freight rates, until finally the company was compelled to restrict its shipments principally to California and Oregon. Subsequently new mills were constructed within this territory and Santa Cruz decided to build a transportation system which now enables it to again extend its markets to parts of Oregon, Washington and Arizona (see *infra*, Sec. F). In these areas it sells in competition with all the other cement producers in northern and southern California and with Oregon and Beaver. The principal markets within these areas are Portland, Ore., San Francisco, San Francisco Bay area, and Los Angeles, California. Of the total output in 1939, approximately 20 percent was shipped to the State of Washington, 3 percent to Honolulu, 20 percent to Southern California, three-tenths of one percent to Arizona, and the balance of approximately 57 percent to Northern California.[11]

In evidence are the answers to questionnaires which the Commission sent to each of the cement manufacturers in Northern California territory calling for a full explanation of the methods used in determining prices and other information. The non-respondent, *Cowell*, did not submit any reply to the Commission except to a very limited extent.[12] However, *Cowell's* pricing methods have been indicated in the course of the hearing, as hereinafter reported.

None of the officers or directors of any respondent company in Northern California now is or ever has been an officer or director of, or otherwise connected with, any other cement company, except as follows: Shelby of Cala-

[11] Id. (R) Tr. 42860-63.

[12] Com. Ex. 3136.

veras was connected with the Texas Portland Cement Company prior to June, 1927. Holmes of Calaveras was an officer of Yosemite prior to July, 1936. J. B. Smith of Calaveras was an officer of Pacific prior to December, 1927. Van Slyke of Yosemite was employed as a traffic man and salesman of Pacific prior to about 1932.[13]

PORTLAND CEMENT PLANTS ON THE PACIFIC COAST[14]

California

Company	Mill	Constructed	Cit.
California	Colton	1892	Com. Ex. 3156 B
Standard Port. Cem. Corp.	Napa Jct.[15]	prior to 1910	Resp. Ex. 3764 A
Pacific	Cement (Tolenas)[16]	prior to 1907	Tr. 8610
Cowell	Cowell	prior to 1910	Resp. Ex. 3764 A
Santa Cruz	Davenport	1907	Tr. 42863
Los Angeles Aqueduct Commission	Monolith	prior to 1910	Resp. Ex. 3764 A
Riverside	Crestmore	1910	Tr. 8974

[13] Calaveras (R) Tr. 42850-51.
Pacific (R) Tr. 42835.
Santa Cruz (R) Tr. 42858-59.
Yosemite (R) Tr. 42843-44.

[14] The company name in each instance is the name of the company which operated the mill at the time it was first established. Many of these companies are no longer in existence and a number of the mills have been abandoned or are out of operation. For the mills operated by respondents during the period covered by the complaint see Sec. A of Part XVII-A, *supra*, and Part XVII-B, *infra*, pp. 2752-55.

[15] Abandoned after 1923. Resp. Ex. 2521.

[16] Abandoned after 1926. Resp. Ex. 264 A; Tr. 8610.

Company	Mill	Constructed	Cit.
Golden State Port. Cem. Co.	Oro Grande[17]	1911	Resp. Ex. 3765 A
South-western	Victorville	1916	id.
Old Mission Port. Cem. Co. (Pacific)	San Juan Bautista[18]	1918	Resp. Ex. 3765 B
Pacific	Redwood Harbor	1924	id.
Calaveras	Kentucky House	1926	Resp. Ex. 3765 C
Yosemite	Merced	1927	id.
	OREGON—WASHINGTON		
Oregon	Oswego	1916	Resp. Ex. 3765 A
Beaver	Gold Hill	1917	Resp. Ex. 3765 B
Sun Port. Cem. Co.	Lime	1923	id.
Washington Port. Cem. Co.	Concrete, Wash.	prior to 1910	Resp. Ex. 3764 E
Inland Port. Cem. Co.	Metaline Falls	1911	Resp. Ex. 3765 A
International Port. Cem. Co., Ltd.	Irvin	1913	id.
Olympic	Bellingham	1913	id.
Pacific Coast Cem. Co.	Seattle	1929	Resp. Ex. 3765 C
North-western Portland	Grotto	1928	id.

[17] Not operated since 1928. Fdgs., Par. One (3g).

[18] Not operated since 1930. Com. Ex. 3166 G.

B. Pricing—Commercial.

1. Identity of Published Prices

The evidence is undisputed that the market for cement is at destination. Counsel for the Commission *conceded* that the purchaser of cement always buys on the basis of the laid-down delivered cost at the point of use.[1] Dealers and Government purchasing agents so testified.[2] Counsel for the Commission *conceded* that if other dealers were called they would testify to the same effect.[3] Dealers and Contractors alike ask for delivered prices.[4] The Trial Examiner excluded further evidence to the same effect.[5]

The evidence is undisputed that no buyer will pay a penny more for one brand of cement than he will for another.[6]

There is no issue as to the fact of substantial identity of price at any given time and place. The Commission has found that, in general, the commercial prices of all sellers of cement at any given delivery point are the same.[7]

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[1] (R) Tr. 36299, 36734.

[2] McCracken, Dealer (R) Tr. 36713, 36715, 36721-22, 36766.
Peoples, U. S. Dir. of Procurement (C) Tr. 10310-11, 10347.
Custer, Senior Admin. Ass't, Bur. of Supplies & Accounts, Navy Dept. (C) Tr. 21306-07.

[3] (R) Tr. 36744.

[4] (C) Tr. 8439, 8444.

[5] (R) Tr. 28049, 32134, 32140.

[6] Holmes, former Vice President, Yosemite (C) Tr. 8731.
Carpenter, Statter, President, Beaver (R) Tr. 47765.
Cameron, General Manager, *Olympic* (C) Tr. 8550.
Merrill, Partridge, Vice President and Sales Manager, Southwestern (Victorville) (C) Tr. 8870, 8898.
Com. Ex. 967-1 N, 1 O, 2 T: Answers to Clark-Burns questionnaire (Superior Portland; Spokane).
Com. Exs. 1267 B, 3172 E-F: Answers to Commission's questionnaire (Calaveras; Northwestern Portland).
See also cit., *supra*, Part II C, pp. 204-212.

[7] Fdgs., Par. 9(a). See also Part II C, p. 203, *supra*.

There is expert testimony by both Commission's and respondents' economists that effective competition itself tends to produce a uniform market price at a particular time.[8]

Executives of cement companies in Northern California testified that they ordinarily found destination prices of various cement mills the same.[9]

The evidence as to the reasons for this is illustrated by the following typical testimony: Holmes, who was Vice President of Yosemite until August 1936, testified that Yosemite made its first shipment in the latter part of 1927.[10] Holmes was examined regarding Yosemite's delivered prices as follows:

By Mr. Wooden:

"Q. Was it the aim of the Yosemite mill to make its delivered prices the same as the delivered prices of other mills? A. It was our aim to get just as much money for our cement as we could.

Q. In doing so, was it the aim to make your delivered prices the same as those of other mills? * * * A. We cared nothing about the others' prices, but we wanted to make the most money we could.

Q. Well, did you, in general, have your delivered prices on an equality with the delivered prices of other mills? A. At the time that I went with the Yosemite Company, we had a small volume of busi-

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[8] Viner, Professor of Economics, Univ. of Chicago (C) Tr. 15762, 15813.

Nourse, Director of Institute of Economics, Brookings Institution (C) Tr. 48140.

Hibbard, Prof. of Agriculture, Univ. of Wisconsin (C) Tr. 15588.

Westerfield, Professor of Economics, Yale Univ. (R) Tr. 45680-81.

Griffin, Professor of Marketing, Univ. of Michigan (R) Tr. 43024.

[9] Gay, Gen'l Mgr., Santa Cruz (C) Tr. 8617-18, 8631-32, 8651, 8655.

Shelby, Vice President, Calaveras (C) Tr. 8692, 8704-05, 8718.

[10] (C) Tr. 8725-26.

ness. We had only been in existence about a year and a half, and we were groping our way trying to get all the business we could and make all the profit that we could; and we conformed to the prices that had been published if we could get them, because we were anxious to make every cent of profit that we could. * * *

Q. Well, you say, as I understand it, that you endeavored to conform to the prices that were published when you entered the field? A. No, I didn't say that, sir. I said that I tried to sell at the prices published because by doing so it would give us as much money as we could possibly make any other way." (Tr. 8733, 8735-36)[11]

The evidence is that an openly quoted lower price simply results in a temporary gain with no ultimate advantage to the company making the reduction because competitors immediately meet the lower price.[12]

The evidence is that the openly quoted commercial prices of cement companies are the same whether they reflect a base at a mill in Northern California, a blanket or zone price in Southern California, a so-called "arbitrary" price, or otherwise.[13] For example, Gay, General Manager of Santa Cruz, was questioned about prices in Vancouver, Washington, as follows:

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[11] To the same effect:
Gay, Gen'l Manager, Santa Cruz (C) Tr. 8628.
Shelby, Vice President, Calaveras (C) Tr. 8704-05, 8713-14.

[12] Shelby, Vice President, Calaveras (C) Tr. 8714, 8718.
Tongue, Secretary, Superior Portland (C) Tr. 8449-50.
Blair, Chief Clerk in Charge of Sales, California (R) Tr. 42469.

[13] Gay, *supra* (C) Tr. 8636, 8651.
Shelby, *supra* (C) Tr. 8693.
Holmes, former Vice President, Yosemite (C) Tr. 8765.
Tongue, Secretary, Superior Portland (C) Tr. 8388, (R) Tr. 42918.
Partridge, Sales Manager, Southwestern (Victorville) (C) Tr. 8886.
Com. Ex. 1280 A-G: Southwestern (Victorville) price list.

By Mr. Wooden:

"Q. You don't know whether any of those are arbitrary? A. We haven't any way of knowing.

Examiner Norwood: You can figure their mill net, can't you?

The Witness: I have never attempted it, if your Honor please. We have only quoted destination prices." (Tr. 8655)

For the evidence as to the factors that bring about identity in connection with commercial prices of cement see, further, Part II, pp. 204-212, *supra*. For the evidence as to identity or non-identity of sealed bids to public agencies see this Part XVII-A, pp. 2696-2701, *infra*.

2. Origin of Basing Points in California

George, General Manager of *Cowell*, testified:

By Mr. Leisure:

"Q. Do you recall whether there was a sole basing point at Davenport prior to 1918, Mr. George? A. I would say that prior to 1918 Cement also was a basing point.

Q. The town of Cement? A. Yes, sir.

Q. What effect, if any, did the War Industries Board have upon that situation? A. Well, in 1918, it strikes me it was, the War Industries Board made a very careful survey of the situation and fixed basing points at Crestmore, Cement, Davenport, and I don't know but what they included Monolith.

Q. And what price, do you recall, stripped? A. Around $1.90. I am not quite sure whether it was $1.85 or $1.90.

Q. It might have been $1.95? A. It might.

Q. What is the base price today? A. I beg your pardon?

Q. What is the base price today? A. The strip price today is supposed to be $1.90.

Q. And since 1918 have your costs increased considerably? A. Our costs have increased since 1918 decidedly." (Tr. 8784-85)

And again:

By Mr. MacIntyre:

"Q. Will you state, Mr. George, whether or not the action of the War Industries Board was to name a price at certain points rather than the establishment of certain points as basing points? A. Oh, I think they decidedly established basing points." (Tr. 8786-87)[1]

Gay, General Manager of Santa Cruz,[2] testified that prices were established by the War Industries Board for a short time following the War and Santa Cruz' mill at Davenport was the only basing point in Northern California.[2]

3. Base Prices in Northern and Central California.

a. The August, 1929 Price Changes

Shelby, Vice President of Calaveras testified:

By Mr. Wooden:

"Q. Was there a time in your experience when the prices in northern or central California were all based on Davenport? A. Yes, sir, the first year we operated, I think.

Q. When was that? A. That was in 1927 and part of '28.

Q. During that time, on your nearby sales you added the freight from Davenport? A. Added the freight to Davenport.

Q. That had the effect of considerably increasing your mill net in that particular locality? A. Well, we had only been in existence about a year, and we were feeling our way to find out just what price conditions were. Our volume was very low, and we just

[1] To the same effect: Com. Ex. 3166-D, reported, *infra*. Cf. Fdgs., Par. 7(m).

[2] (C) Tr. 8615.

and was selling that cement under conditions that approached as nearly as possible those which the imported cement was being sold, and at reduced prices. We felt ourselves under the necessity of meeting that situation to hold our trade, and did so by establishing similar stocks and selling in like manner.

In December, 1935, the manufacturer who had originated these stocks discontinued them and ceased selling in that fashion, and we did so also.

Q. You did so, also? A. Yes."[8]

Lehigh at no time had any understanding or agreement with any of its competitors with respect to its stocks of cement in Brooklyn.[9]

Medusa never maintained a stock of cement or a warehouse in Brooklyn.[10]

Nazareth established a stock of cement in Brooklyn in July of 1935 for the purpose of meeting the competition of foreign cement. Some of the company's competitors had established warehouses in Brooklyn, but Nazareth sold from freight cars. The company had learned of the stocks of competitors in Brooklyn from filings with the trade practice committee, and, in addition, had found notification in the field that the North American Company had established such a stock. Prior to that time, Nazareth had no knowledge or information as to such stocks.[11] The establishment of the Brooklyn stocks by competitors made a much more attractive proposition to dealers than Nazareth had been giving the dealers. Hence the company had to meet such competition in order to do business.[12] Nazareth met the low prices in Brooklyn although it was unprofitable to the company, because it could not afford to withdraw

[8] Bowen, Vice President, Lehigh (R) Tr. 26966-67.

[9] Id., Tr. 26966-67, 26973.

[10] Dawson, Vice President, Medusa (R) Tr. 40073.

[11] Robeson, Vice-President, Nazareth (R) Tr. 28177.

[12] Id., Tr. 28180.

from the market, the customers involved being old established ones of Nazareth.[13]

Nazareth withdrew its stocks in Brooklyn when the company discovered from notices picked up in the field that competitors also were withdrawing stocks. There was no obligation on the part of the company to follow the withdrawal, and, if one or two sizable manufacturers had continued the stocks, Nazareth would have continued them also. Since that time Nazareth has had no fixed policy for meeting the competition of foreign cement. It has sought only to try to meet this competition by persuading customers to use American cement. The company has found that although foreign cement is as satisfactory as domestic cement from a standpoint of its quality, domestic manufacturers have an advantage from a sales standpoint in that supplies of foreign cement are sporadic. In addition, foreign producers supply only non-tested stock, whereas domestic producers are in a position to furnish any type of tested stock that the customers desire.[14]

Nazareth at no time has had any understanding with importers or any one else regarding the price at which it sold cement in Brooklyn.[15]

North American in July 1935 placed a stock of cement on a barge at the foot of 20th Street in Brooklyn, New York. This was done in an effort to meet the competition of imported cement which was arriving in Brooklyn in paper bags and was being stored in warehouses. North American did not want to lease a warehouse and did not want to place railroad cars at the Brooklyn freight station because of the costs involved. The company initiated this policy and did not discuss the matter with any competitor. On July 11, 1935 the company broadcast quotations to

[13] Robeson, Vice President, Nazareth (R) Tr. 28194.

[14] Id., Tr. 28200-01.

[15] Id., Tr. 28203.

dealers giving notice of the lower price and of the conditions at which it was offering this cement.[16] Robeson[17] identified North American as the company which filed with the trade practice committee of the Institute its prices, terms and conditions of sale, and the trade practice committee broadcast this information to thirty-one manufacturers, many of whom notified the trade practice committee of their intention to meet this competition.[18] Other cement manufacturers learned of this Brooklyn stock through dealers and their own salesmen.[19]

Late in 1935 widespread trucking of cement from the Brooklyn stocks to points removed from the competition of foreign cement, plus the fact that ice formations prevented the water delivery of cement to replace the Brooklyn stocks, led North American to the withdrawal of its stock. North American was the first company to withdraw its Brooklyn stock.[20]

Whitehall did not place a stock of cement in Brooklyn in 1935 to meet the competition of foreign cement.[21]

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[16] Com. Ex. 985 A-B: Letter, 7/6/35, Reiter, Chairman, Trade Practice Committee to 31 manufacturers.
Duffy, S. V., Dealer (C) Tr. 7903.
Harte, Vice President, North American (C) Tr. 7521, 8256-58.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6577-78.
Porter, President, North American (R) Tr. 33851-59.

[17] Robeson, Vice President, Nazareth (R) Tr. 28177.

[18] Neylan, *supra*, Tr. 6596-97.
Robeson, *supra*, Tr. 28178-85; Com. Ex. 210 H-I: Letter, 7/6/35, Reiter, Chairman, Trade Practice Committee to 31 manufacturers.
Twamley, Vice President Coplay (C). Tr. 6822.

[19] Brobston, President, Hercules (R) Tr. 26212-14, 26477-78.
Robeson, *supra*, Tr. 28180-82.
Scott, H. M., President, Keystone (R) Tr. 27464-65.

[20] Harte, *supra*, Tr. 8245-47, 8258.
Porter, *supra*, Tr. 33859-60.

[21] Elliott, Vice President, Whitehall (R) Tr. 28536.

PART XVII

PACIFIC COAST

PART XVII-A—NORTHERN AND CENTRAL CALIFORNIA

A. Producing Companies and Their Sales Areas.

Calaveras was organized on January 13, 1925. Its stock is owned by several hundred separate stockholders, none of whom owns a controlling interest, and none of whom is connected with any other cement company. It has been under the same management for more than ten years.[1] Its principal office is in San Francisco. A branch office is maintained in Los Angeles for the sale of white cement only. All cement sold by Calaveras is manufactured at Kentucky House, San Joaquin County, California, where its plant and deposits of raw materials are located. The first cement was manufactured in June, 1926. The mill has a capacity of 1,200,000 barrels per annum.[2]

Calaveras' principal marketing area is in northern and central California, although a small amount of cement is marketed through dealers in Nevada and southern Oregon. For the last several years shipments to Oregon have been practically nothing. Calaveras sells no standard cement in Southern California. Calaveras cement is sold in competition with that of *Cowell*, Santa Cruz, Pacific, Yosemite, Beaver, Oregon, Monolith, Riverside, California and Southwestern (Victorville).[3]

Pacific was organized on March 17, 1927. Pacific's mills are located at Redwood Harbor, and San Juan Bautista, California. Their annual capacities are approximately:

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[1] Shelby, Vice President; Smith, Treasurer, and Tedesco, Secretary, Calaveras (R) Tr. 42850, 42851.

[2] Id., (C) Tr. 8681-82; (R) Tr. 42850-51; Com. Ex. 1267 F, G; Resp. Ex. 3765 A-C.
Fdgs., Par. One (k).

[3] Id., (C) Tr. 8682; (R) Tr. 42852.

took the prices as we found them in the territory. We had no prices of our own at that time.

Q. When was it that that basing on Davenport alone ceased? A. In August, 1929, I think.

Q. What succeeded the method of basing on Davenport? A. A base at each mill.

Q. How was that change inaugurated? A. That was inaugurated by a competitor. We were forced to follow it.

Q. Who was that competitor? A. Cowell Portland Cement." (Tr. 8684-85)[1]

And again:

By Mr. Wooden:

"Q. Well, as I understand it, there was some reduction in price that took place, a fairly substantial reduction following the inauguration of this base price at each mill by Cowell? A. The price at destination—many destinations change. There was a reduction in practically every destination except that reached by the Santa Cruz Company by reason of their low freight rate.

Q. And were the old prices restored some time after that? A. I don't think you and I are talking about the same thing, Mr. Wooden. When the price sheets of Cowell came out, prior to that all prices were based on Davenport. Destination prices were shown as being Davenport plus the freight rate.

Q. All right. The Cowell came out and changed those destination prices throughout Northern and Central California. It made many, many reductions in the prices at destinations throughout California." (Tr. 8691-92)[2]

And again:

By Mr. Wooden:

"Q. Now, Cowell, on this occasion where he put in these base prices on different mills, he took less than

[1] To the same effect: Holmes, former Vice President, Yosemite, Tr. 8730.

[2] To the same effect: Holmes, T. K., former Vice President, Yosemite (C) Tr. 8730.

the delivered price figured on the base price, did he not, at various destinations? A. Yes.

Q. Would you call that absorbing freight or price cutting? A. Well, I don't know. That is a change in marketing conditions. I would put it that way.

Q. A change that resulted in lowering the prices? A. That is true." (Tr. 8718-19)

And again:

"Q. My understanding was that the Cowell prices, whatever they may have been at destination were based on $2.45 at the various mills; is that right? A. That is right.

Q. Does that mean that although the $2.45 was the nominal base, that they didn't add the full freight to that $2.45 at some destinations? A. No, they did that. They added the freight rate to all of those prices that they put in various mills serving their district to arrive at their delivered prices in their own seat. I presume we figured it back that way, anyhow." (Tr. 8719-20)[3]

George, General Manager of *Cowell*, testified as to the reasons for the price changes issued by his company in August 1929, as follows:

"A. Well, I was satisfied at that time that some of the mills were basing prices on special jobs at their mills other than Davenport, and I thought it was no more than fair to do it straight through. Furthermore, I felt that it would be a move that would be very satisfactory to the trade, and we just did it to beat what we felt was competition and also to make a good trade move from a selling standpoint.

By Mr. MacIntyre:

Q. Your reference to the trade there is to what class of trade, Mr. George? A. When I say 'trade' I mean the dealer trade.'"[4]

[3] To the same effect: Gay, General Manager, Santa Cruz (C) Tr. 8618.

[4] (C) Tr. 8773-74.

b. Other Evidence

Calaveras answered the Commission's questionnaire of June 1931 as to the method used by it in determining delivered prices of cement, and the changes in its prices since January 1, 1929, as follows:

> "The Calaveras Cement Company began operations in the latter half of 1926, and found that the existing competition, based on Davenport, was $2.45 per bbl., including cloth packages, f.o.b. cars, Davenport, California, plus the carload freight rate to destination. The basis was used until August 1929, when a competitor announced a new schedule of prices for its product based on $2.45 per bbl., including packages, at each Northern California mill, to which was added the freight from the mill having the lowest rate to the point of delivery, and we were obliged to meet this competition. In October 1929, to meet temporary market competition, our mill basis was reduced first to $2.41 then, to $2.31, and on November 12th was again made $2.45.
>
> This price has prevailed since that date with the exception of a change in discount terms in May of 1930. * * * There has been one change in our mill price since our last report to the Commission from $2.45 per barrel to $2.25 per barrel. This change took effect on June 26, 1931."[1]

Pacific answered the Commission's questionnaire as follows:

> "The War Industries Board Council of National Defense May 6, 1918, established base price for cement in California at Crestmore (Southern California,) and Cement and Davenport (Northern California) and this method of making prices continued for a number of years.
>
> Base price January 1, 1929, f.o.b. cars Davenport $2.45 per bbl. (including cloth sacks) plus freight rate to destination.
>
> October 1, 1929, base price f.o.b. cars Redwood Harbor and San Juan $2.41 per bbl. (including cloth sacks) plus freight rate to destination.

[1] Com. Ex. 1267 A, G.

October 9, 1929, base price f.o.b. cars Redwood Harbor and San Juan, $2.31 per bbl. (including cloth sacks) plus freight rate to destination.

November 12, 1929, base rate f.o.b. cars Redwood Harbor and San Juan, $2.45 per bbl. (including cloth sacks) plus freight rate to destination.

* * *

Base price of Cement—F.O.B. Cars Redwood Harbor including cloth sacks at 10¢ each, 4 sacks to a bbl. Dealer's Discount 20¢ per bbl. and Cash Discounts 2%

Jan. 1, 1931 $ 2.45 per bbl.

Changed June 26, 1931 to 2.25 " " "[2]

The Clark-Burns data of 1935 shows numerous changes in the base prices of the mills in Northern California, as follows:

Date	Base Price
Jan. 1, 1925	1.90
Jan. 1, 1927	1.85
Jan. 1, 1928	1.90
Aug. 12, 1929	1.85
Oct. 1, 1929	1.81
Oct. 9, 1929	1.71
Nov. 12, 1929	1.85
May 1, 1930	1.80
July 1, 1931	1.60
July 1, 1932	1.70
Jan. 1, 1933	1.80
Jan. 17, 1933	1.60
Jan. 2, 1934	1.90
Apr. 9, 1934	1.30
May 28, 1934	1.90[3]

Counsel for the Commission *conceded* that the level of cement prices is not in issue.[4]

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[2] Com. Ex. 3166 D, G.
To the same effect: Com. Ex. 3140 B-D (Santa Cruz), Com. Ex. 3157 E-F (Yosemite).

[3] Com. Exs. 967-7 T, 7 V, 8 K; 968-10 W, 11 H, 11 V, 12 C, 11 W.

[4] (R) Tr. 29176.

Santa Cruz base price of $1.90 at Davenport is based upon costs of operation and the profit it wants to make; it does not net $1.90 on much business.[5]

In answer to the Clark-Burns questionnaire Pacific stated that the elements entering into its base price are "Mill net + sacks + cash and dealer discounts."[6] Yosemite's answer to the Clark-Burns questionnaire states that its base price is set arbitrarily and that a change in the price at a neighboring basing point "directly decreases revenue" because it induces a similar change in Yosemite's base price in order "to meet competition and enable us to sell."[7] The answers of Yosemite and Santa Cruz state that there is no one "price leader" in Northern California. Pacific's answer states that there are two "price leaders," *Cowell* and Calaveras.[8]

Shelby, Vice President of Calaveras testified:

> *By Mr. Wooden:*
>
> "Q. Who, in your organization, Mr. Shelby, determines what the base price of your mill should be? A. Generally, the president and myself discuss that.
> Q. Discuss it and decide it? A. Decide it." (Tr. 8708-09)

Calaveras realizes its full mill net in a very limited area around its mill. In this area there are only small towns which are not good markets for cement. The principal markets of Calaveras are the city of Stockton and Sacramento. In these two towns Calaveras has equal freight rates with competing mills in Northern California and gets the same mill net as they do.[9]

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[5] Gay, General Manager, Santa Cruz (C) Tr. 8622, 8614-15, 8674.

[6] Com. Ex. 968-11 U, 11 V.

[7] Com. Ex. 967-8 J, 8 K.

[8] Com. Exs. 967-7 U, 8 L; 968-11 W.

[9] Shelby, Vice President, Calaveras (C) Tr. 8702-03, 8711-12.

4. Source of Price Information

Concerning price changes, the Commission has found that "Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately".[1] The evidence is that prices at given destinations are well known to customers who purchase cement. Shelby, Vice President of Calaveras, testified "Our own men are always calling on them; not only our own dealers but every dealer in a town keeping himself and us posted." Shelby testified that his company covers its sales area at present by twelve salesmen located at points scattered throughout the territory and in this manner it learns the prices its competitors are quoting and whether or not they are undercutting prices currently being quoted by Calaveras.[2] Pacific covers its sales area at present by thirty-one salesmen who are located at points scattered throughout the area.[3] Santa Cruz covers its sales area at the present time with twelve salesmen.[4]

a. Use of Price Lists

The use and distribution of price lists by Santa Cruz is described in its answer to the Commission's questionnaire as follows:

> "• • • We aim to publish on the first of each month, a price sheet naming a price for Santa Cruz portland cement, in carload lots, f.o.b. destination points named and distribute these to our salesmen, customers and anyone else soliciting a copy. The salesmen, in soliciting business, have no difficulty in learning from the proposed purchaser, whether or not some of our competitors are quoting a lesser price, and it

[1] Fdgs., Par. 9(e).

[2] Shelby, Vice President, Calaveras (C) Tr. 8714; (R) Tr. 42852-53.

[3] Downing, Director of Sales, Pacific (R) Tr. 42836, 42838.

[4] Gay, General Manager, Santa Cruz (R) Tr. 42862.

would be optional with us to accept this business at the lesser price."[1]

Gay, General Manager of Santa Cruz, testified that it has been the practice of his company to print and publish delivered price lists ever since the days when its mill was the only basing mill in the area. Santa Cruz' price lists are published on the date they are effective. They are not circulated to anyone in advance. They are put in the mail the night of the day before they become effective. They are sent to all dealers handling Santa Cruz cement and to competitors in the territory in which Santa Cruz does business. Competitors to whom Santa Cruz' price lists are sent are Pacific, Calaveras, *Cowell,* Yosemite, Riverside, California, Victorville, Monolith, Oregon and Beaver. No lists have been sent out to Ideal or Colorado.[2] Santa Cruz has received price lists from other companies, to wit, *Cowell,* Victorville, California, Riverside and, a long time ago, from Pacific. Gay did not recall ever having seen price sheets from Oregon or Beaver.[3]

Santa Cruz price lists are prepared by its Traffic Manager from the freight tariffs and any information as to changes in base prices which is gathered by Gay and passed on to him as the prices come out. Santa Cruz has no other source of price information. It has never submitted its price lists to other mills to see if their base prices and delivered prices were correct.[4] Santa Cruz' price sheets have been in vogue so long that it rarely uses any base prices in preparing its price lists. The whole territory is covered by stations and there is a published price for each station.[5] When Santa Cruz put out price lists for Southern

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[1] Com. Ex. 3140 C.

[2] Gay, General Manager, Santa Cruz (C) Tr. 8626, 8632-35.

[3] Id. (C) Tr. 8635.

[4] Id. (C) Tr. 8642-43.

[5] Id. (C) Tr. 8632.

California, Arizona and Southern Nevada it followed the destination prices of the mills in those localities.[6]

In evidence are the current price list of Santa Cruz containing the delivered prices at stations in Northern California and Nevada, effective June 1, 1938, and a complete set of Santa Cruz' price lists and the various supplements thereto for the last several years which were furnished at the request of Counsel for the Commission.[7]

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[6] Id. (C) Tr. 8636, 8661.

[7] Tr. 8631, 8677.

Santa Cruz Price List	Dated	Com. Ex.
Oregon	4/ 1/33	1214
Northern & Central California & Nevada	11/ 1/33	1219
Northern & Central California & Nevada	1/ 2/34	1220
Oregon	5/14/34	1215
Northern California & Nevada	2/15/35	1265
Southern California, Arizona & Southern Nevada	2/15/35	1266
Oregon	3/ 1/35	1264
Southern California, Arizona & Southern Nevada	4/ 6/35	1263
Northern California & Nevada	5/ 1/35	1262
Oregon	5/27/35	1261
Northern California & Nevada	5/30/35	1259
Washington	6/ 3/35	1260
Northern California & Nevada	7/ 4/35	1258
Northern California & Nevada	8/ 1/35	1257
Northern California & Nevada	9/ 1/35	1256
Southern California, Arizona & Southern Nevada	10/21/35	1255
Northern California & Nevada	11/ 1/35	1254
Southern California, Arizona & Southern Nevada	12/ 2/35	1253
Northern California & Nevada	1/10/36	1252
Oregon	2/ 1/36	1216, 1251
Washington	3/25/36	1218
Northern California & Nevada	4/ 1/36	1249
Arizona & Southern Nevada	4/ 1/36	1224

Santa Cruz' price lists are not published at any regular interval. Santa Cruz tries to avoid the added cost for printing and only gets them out when there are sufficient changes to make it cheaper to get out a new list. It may be a period of two or three months or, if something unusual happens, it may publish a list every month. Santa Cruz handles changes in between publication of the printed lists by notifying its salesmen.[8]

Santa Cruz Price List	Dated	Com. Ex.
Southern California	4/15/36	1223, 1247
Supplement No. 1 to Northern California & Nevada	5/ 1/36	1250
Northern California & Nevada	6/ 8/36	1246
Supplement No. 1 to Northern California & Nevada	7/ 1/36	1248
Northern California & Nevada	9/ 1/36	1221
Supplement No. 1 to Northern California & Nevada	10/ 1/36	1240
Supplement No. 2 to Northern California & Nevada	11/ 1/36	1241
Northern California & Nevada	1/11/37	1222
Southern California, Arizona & Southern Nevada	1/11/37	1225
Oregon	1/19/37	1217
Supplement No. 1 to Northern California & Nevada	3/ 1/37	1245
Supplement No. 2 to Northern California & Nevada	4/ 8/37	1244
Supplement No. 3 to Northern California & Nevada	8/ 1/37	1243
Supplement No. 4 to Northern California & Nevada	8/19/37	1242
Northern California & Nevada	9/ 1/37	1239
Northern California & Nevada	10/ 1/37	1234
Oregon	10/ 1/37	1238
Northern California & Nevada	12/ 1/37	1233
Arizona & Southern Nevada	12/10/37	1236
Southern California	12/10/37	1237
Arizona	1/15/38	1235
Northern California & Nevada	3/ 1/38	1232
Northern California & Nevada	6/ 1/38	1211

[8] (C) Tr. 8668.

Holmes, who was Vice President of Yosemite until August, 1936, testified that he did not recall receiving price lists from Santa Cruz when he was with Yosemite. He did recall going out and getting the price lists of competitors from dealers.[9] Holmes was examined as to the issuance of price lists by Yosemite, as follows:

> "*By Mr. Wooden*:
>
> Q. Did your Yosemite Company publish price lists? A. For the use of our representatives at that time. I don't remember whether we put them out in general to the trade or not.
>
> Q. Was there some time when you, during your connection with the Yosemite mill, that you did put them out to the trade as well as to your salesmen? A. Yes, sir.
>
> Q. You can't say when that was? A. No, I can't. In general, we had the policy of issuing no more price lists than we had to because of the expense of issuing them.
>
> Q. Did you put them out in mimeographed form or printed form? A. Sometimes printed, although later years, in my connection with them, we put them out in mimeographed form." (Tr. 8737-38)

Shelby, Vice President of Calaveras, testified that his company does not publish a price list regularly but has done so on two or three occasions. As Calaveras grew its trade wondered why it didn't have a price sheet and so it finally published one. Any changes to the original price list were made by supplement which was kept in Calaveras' office and not distributed. When the Code came in, there were a good many supplements to some of the price sheets, therefore, Calaveras reissued the list and included certain features required by the Code. Calaveras' present price list was published in January, 1937.[10]

Calaveras makes up its price list by basing on its mill in the areas in which it has lower freight rates. In the

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[9] (C) Tr. 8736.

[10] (C) Tr. 8692-93.

zones outside Calaveras meets the prices that it has been able to find in effect. In evidence is a pamphlet "Consumer Prices on Calaveras cement in California and Nevada," dated Jan. 10, 1936, effective the same date.[11] When Calaveras distributes its price sheets to the trade, it mails copies to everyone who is on its mailing list, including its four competitors in Northern California. Calaveras occasionally receives price lists of Santa Cruz.[12]

George, General Manager of *Cowell*, testified that his company occasionally publishes price lists. *Cowell* send them to competitors as a matter of courtesy because it has them on the mailing list.[13] George testified that he received a copy of a price list of Santa Cruz for a number of destinations in California and Nevada, effective June 1, 1938, when it was sent to his company by mail.[14] The prices in this list are the prices at which sales are made in general to the dealer trade, but the bigger jobs are all being cut to pieces. Neither *Cowell* nor its competitors adhere religiously to these prices.[15]

5. Sales Below Published Quotations

There is direct evidence of price-cutting by the cement companies in Northern California and by their competitors, as follows:

Holmes, Vice President of Calaveras and formerly Vice President of Yosemite, testified from his experience with each of those companies that he sold a little under the prices indicated in his price lists when he felt that he needed the business.[1]

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[11] Id. (C) Tr. 8684, 8693-94; Com. Ex. 1268.

[12] Id. (C) Tr. 8692-93, 8716-17.

[13] (C) Tr. 8785-86.

[14] (C) Tr. 8769-70; Com. Ex. 1211.

[15] Id. (C) Tr. 8770, 8779.

[1] (C) Tr. 8761.

George, General Manager of *Cowell*, testified that neither *Cowell* nor its competitors adhere religiously to the prices in their price lists. When *Cowell* is satisfied that a dealer is selling at a price which shows that he must be getting better prices from some competitor, it then tries to put the dealer in a position to compete.[2] For the evidence as to price cutting in the Washington-Oregon territory and in Southern California, see Part XVII-B, pp. 2779-80 and Part XVII-C, pp. 2829-30.

The Trial Examiner curtailed the evidence offered by respondents as to secret prices and ruled that "any further evidence on that matter is cumulative".[3]

6. Absence of Agreement

There is testimony of one or more responsible executives of each of the Northern California companies expressly denying that his company ever at any time had any understanding or agreement with any competitor to quote the same price as such competitor for cement at any place or to any customer, or to use or employ any particular system or method of pricing, or respecting any of its pricing practices.[4]

On November 18, 1935 Riverside, in accordance with its established policy of broadcasting prices, sent the following night letter to Pacific:

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[2] (C) Tr. 8782-83, 8785-86, 8779.

[3] Tr. 32819-20.

[4] Shelby, Vice President, Smith, Treasurer, and Tedesco, Secretary, Calaveras (R) Tr. 42853-54.
Downing, Director of Sales and Canvin, Secretary, Pacific (R) Tr. 42838-39.
Gay, General Manager, Santa Cruz (R) Tr. 42863-64.
Van Slyke, Secretary, Yosemite (R) Tr. 42846.
(Commission's counsel conceded that the following former officials of Northern California companies were deceased:
Henderson, President, Pacific; Holm, Asst. Sales Mgr., Yosemite. Resp. Ex. 3753 A-B.)

"Effective tomorrow November 19th prices for our cements are hereby increased 30¢ per barrel over prices quoted in our list of October 21, 1935."[2]

The above price change was not followed and a new and lower price was established by one of Riverside's competitors.[3]

C. Pricing—Sealed Bids.

1. Method of Determining Prices

Calaveras answered the Commission's Questionnaire of June 1931 as to the method generally used in arriving at the prices quoted on sealed bids as follows:

"The method used in determining our price on business on which sealed bids are requested is somewhat similar to that used in making any other quotations. Our salesmen are continually calling on dealers and consumers, and thru them we keep in touch with what the general market is doing. Cement is a rather generally accepted standard product and no one brand can as a rule command a higher price than another, so if we have been successful in securing business on our regular basis, and no information of our prices being too high is brought to us thru our salesmen, or our friendly dealers, there is no reason why we should make any different price for business on which sealed or public bids are requested. If the information is brought to us that our prices to our trade are higher than those some other competitor is quoting, it is then up to us to decide whether or not we shall meet this competition, not only to our regular trade, but in the event bids such as you mention are requested."[1]

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[2] Com. Ex. 571-4 W.

[3] Beckett, President, Riverside (R) Tr. 42884.

[1] Com. Ex. 1267 B.
To the same effect:
Com. Ex. 3140 C (Santa Cruz), 3157 F (Yosemite), 3166 D (Pacific).

2. Sealed Bids to the U. S. Government

Northern California companies generally quote prices lower than published prices when bidding on Government invitations.

CALAVERAS: Calaveras bids on municipal, county, state and federal projects at times in various parts of California, Arizona, Nevada, Oregon and Washington, depending upon the attractiveness of the business. On large sales to governmental agencies Calaveras has always quoted prices which were less than the prices it was currently quoting as its commercial trade.[1]

YOSEMITE: Holmes, former Vice President of Yosemite, testified that Yosemite's prices to the Federal government on large orders have always been the lowest prices that it can possibly make and in general have been lower than its published list price.[2]

COWELL: George, General Manager of *Cowell* testified that published price lists are not adhered to on Government sales.[3]

SANTA CRUZ: Gay, General Manager of Santa Cruz was examined as to whether his price list represents the price at which he would sell to the Government:

By Mr. Wooden:

"Q. And is that the price that you quote on bids to the Federal Government, as well? A. Depending on the job. Ordinarily, single carloads, or so, we would quote that price. If it was a large job, where it was—we felt that we ought to do as best we could, sacrifice some of our profit, we would quote—we have quoted lesser prices.

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[1] Shelby, Vice President, Calaveras (C) Tr. 8681-82 (R) Tr. 42852. Holmes, Vice President, Calaveras (C) Tr. 8761-62.

[2] (C) Tr. 8761-62.

[3] (C) Tr. 8779-81.

Q. Meaning taking less than the $2.20 at your mill? A. Less than the $1.90 net.

Q. Less than the $1.90? A. Yes, sir.

Q. You have quoted on a lower basis than the $1.90 mill net on such jobs as Boulder Dam and other large projects of that sort? A. Yes, we did. We have." (Tr. 8637-38)

a. F.o.b. Mill Bids

The evidence is that each of the cement companies in Northern California has bid f.o.b. mill in response to invitations of Government agencies on many occasions.

Pre-Code Period. The Government's purchasing agent subpoenaed by the Commission testified that none of the cement companies in the west ever declined to bid f.o.b. mill to the Government when requested.[1] For this and other evidence as to f.o.b. mill bidding by Northern California companies, see further, Part XVII-B, pp. 2784-87 *infra*.

[Code Period. For the evidence concerning price filing and sealed bids during the Code period, see this Part XVII-A, pp. 2712-26, *infra*.]

Post-Code Period. For the typical evidence of f.o.b. mill bids submitted to Government agencies by Northern California companies, see Part XVII-B, pp. 2789-93, *infra*.

On two small lettings of the Bureau of Reclamation subsequent to the Code Period one or two of the Northern California companies who submitted bids bid the market price at destination, as shown by the current price lists of the respective bidders, and other bidders bid f.o.b. mill prices. On other lettings none of the bids submitted by Northern California companies were identical with any of the other bids submitted either at mill or at destination, as follows:

[1] Taylor, Asst. Chief of Eng. Div., Bur. of Reclamation (C) Tr. 21570.

Bids opened March 20, 1936 for delivery at Mesa, Arizona on 7,000 bbls. of cement in cloth for use on Stewart Mt. Dam, Salt River Project. The bidders were Monolith, California, Riverside, Southwestern (Victorville), Pacific, Santa Cruz, *Cowell*, and a dealer. California bid 2.123, and *Cowell* 1.65, f.o.b. mill. The others bid $3.32 f.o.b. Mesa, which was the current commercial price at destination. After arriving at a mill price, the Government added the land grant freight rate to arrive at a delivered cost. All bids were non-identical as to delivered cost, the lowest being that of Pacific who received the award.[2]

Bids opened May 3, 1937 on 9,000 barrels of cement in cloth for use on Truckee Storage Project, Nevada. The bidders were *Cowell*, Pacific, Yosemite, Calaveras, Monolith and Santa Cruz. All bids were f.o.b. destination, none of which was identical. The Government deducted the commercial freight rate to arrive at a mill price and then added the commercial freight or land grant rate if available, with the result that *Cowell* was low bidder.[3]

Bids opened March 18, 1937 for 107,000 barrels of cement for delivery at Pomona, Washington, for use on the Yakima-Roza Project. The bidders were Santa Cruz, *Washington-Idaho Lime Products Company*, Beaver, Superior Portland and Pacific. Santa Cruz and *Washington-Idaho Lime Products* submitted f.o.b. mill bids which were non-identical. Beaver, Superior Portland and Pacific submitted f.o.b. destination bids, none of which was identical. The Government deducted commercial freight from the destination prices and to the mill price so arrived at added commercial or land grant freight with the result that the delivered costs were all non-identical and Beaver was low bidder.[4]

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[2] Com. Ex. 118 B: Abstract of bids. Santa Cruz price lists, cit., *supra*.

[3] Com. Ex. 120: Abstract of bids.

[4] Resp. Ex. 344 L: Abstract of bids.

(See also Part XVII-B, p. 2787, and Part XVII-C, pp. 2832-38, *infra*.)

On a few small lettings of the Bureau of Supplies, U. S. Navy, each calling for about 6,000 barrels of cement for delivery at San Diego and at Mare Island, California, some of the Northern California companies bid the market prices in effect at the time of the opening, as shown by the current price lists of the respective bidders. Some companies bid lower prices or varying terms of discount.[5]

i. Post Complaint

The Government's purchasing agent subpoenaed by the Commission testified that he was able to obtain competition on the basis of f.o.b. mill prices from all cement companies in the west.[1] Specifically, each of the Northern California companies submitted non-identical f.o.b. mill bids to the Government in response to the "Good Friday" invitation

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[5] Com. Ex. 3212: Bids opened Nov. 8, 1935.
Com. Ex. 1256: Santa Cruz price list.
Com. Ex. 1285: Southwestern price list.
Com. Ex. 3213: Bids opened May 29, 1936 (8,500 bbls. f.o.b. Mare Is.).
Com. Ex. 1295-5 L: Riverside price list.
Com. Ex. 1249: Santa Cruz price list.
Com. Ex. 3214: Bids opened Jan. 8, 1937 (8,800 bbls. f.o.b. Mare Is.).
Com. Ex. 1295-5 Z: Riverside price list.
Com. Ex. 1222: Santa Cruz price list.
Com. Ex. 3215: Bids opened May 18, 1937 (8,000 bbls. f.o.b. Mare Is.).
Com. Ex. 1225: Santa Cruz price list.
Com. Exs. 378 C, 1099 A: Bids opened June 9, 1931 (14,000 bbls. f.o.b. Mare Is.; 1,500 bbls. f.o.b. San Diego).
Com. Exs. 378 D, 1099 D: Bids opened June 26, 1934 (2,500 bbls. f.o.b. San Diego), Price lists cited, *supra*, pp. 2691-92, and *infra*, Part XVII-C.

[1] Peoples, U. S. Director of Procurement (C) Tr. 10221-22.

and in response to a number of subsequent invitations which failed to disclose any destination:[2]

Date 1938	Zone or Area
April 15	Oregon
May 12	California
May 17	(Oregon (Utah (Colorado & Texas
June 13	Washington
June 30	California
July 6	Nevada
July 7	Idaho & Oregon
August 8	Washington
September 7	Washington
September 22	Washington
September 26	Washington

ii. *General*

There is no evidence that any of the Northern California companies ever at any time declined to bid f.o.b. mill when requested to do so, either prior to the Complaint or subsequently.[1]

Shelby, Vice President of Calaveras, was examined about f.o.b. mill quotations to the Government, as follows:

By Mr. Wooden:

"Q. Have you quoted the Government at any time on a straight f.o.b. mill basis without regard to destination cost, or where the destination was? A. We have recently, yes.

Q. How recently? A. Well, I imagine in the last 30 days, or 60 days.

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[2] Id. (C) Tr. 10252, 10363-68, 10270-75.
Com. Exs. 1339-1340, 1381-1382, 1385, 1387, 1389, 1404, 1418, 1422, 1424, 1426.
Resp. Exs. 369-373 incl.

[1] See Recapitulation, Part XVII-C, pp. 2834-36.

Q. Do you suffer any disadvantage from so quoting? A. I imagine that if we quoted f.o.b. our mill to the Government we would get very little of their business.

Q. Well, you have to figure on what your mill net is, in any event, do you not? A. Yes, but we would have to know what the destination was to even figure our competition, to arrive at that mill net.

Q. You didn't do it in the last case, did you? A. No, we didn't. We just made it an arbitrary figure just as we did Boulder Dam and others.

Q. Did you bid your mill base price? A. We did not.

Q. Did you bid below it? A. Yes.

Q. Did you figure you had to bid below it in order to have a chance for the business? A. Yes.

* * *

Q. Do you consider that quoting f.o.b. mill requires you to make the price lower than your mill base? A. No, but that was on a very large quantity of cement, 250,000 barrels was involved in that bid.

Q. Did you believe that quoting f.o.b. mill would tend to reduce your mill base price? A. There is no question about that. It has on all the Government work we have bid on." (Tr. 8705-07)

On cross-examination Shelby explained why Calaveras quoted prices lower than its mill base as follows:

"* * * we knew and know that there is very little Government cement to be used in the area that we serve, and without destinations being known it is impossible for us to get any of that business if we bid our present base price. * * * It was a known fact that there was no cement to be used in the area that we had the lowest freight rate in. Furthermore, the land-grant rates are all against us. We have nothing up in that territory, you see, that has any part of a land grant in it. We are handicapped by maybe fifty to one hundred miles of railroad haul before we get on the main line of the Southern Pacific, where these land-grant rates exist. We are always at that handicap in Government business." (Tr. 8717-18)

Gay, General Manager of Santa Cruz, testified:

By Mr. Wooden:

"Q. Are you familiar with the so-called control clause that was used in quoting Government destination costs? A. That was one that was inaugurated I think during the code period, was it not?

Q. Yes. Is that what you follow? A. We don't; no, sir. We don't. We quote both the destination and mill price, and mill price based on the deduction of the commercial freight rate.

Q. But you don't make a flat unqualified quotation f.o.b. mill for the Government? A. If the Government asked us for a quotation in that way, what if I would do would be to—and knowing the destination, I would deduct the commercial freight rate, as I said.

Q. But will you quote f.o.b. mill without knowing the destination? A. Will I?

Q. Yes. A. Oh, I guess we have.

Q. Have you? A. Yes, sir.

Q. Consistently or—— A. There is no—I would have no objection to doing it.

Q. Will you do it now if it is asked? A. If I were asked to do it?

Q. Yes. A. Yes."

Keller, former Vice President of Pacific, testified that Pacific sold cement to the Federal Government the way the bids called for. If it was called for at the mill Pacific quoted the Government at the mill, and if it was called for at destination Pacific quoted the Government at destination.[2]

The Trial Examiner *conceded* "that there is abundant evidence in the record to show that the Government did ask for destination bids on some sort of a basis, and not only that, but in all cases have made the awards on a destination cost basis," and that that is the reason why cement manufacturers have customarily quoted destination prices. The

[2] (C) Tr. 9171.

Trial Examiner rejected further evidence to the same effect as being "cumulative."[3]

The Commission conceded that there is "unconvertible evidence that public purchasing agencies generally request that they be quoted delivered prices."[4]

ABSENCE OF AGREEMENT. Responsible executives of the respondent companies in Northern California each testified that they never agreed with any competitor, either expressly or impliedly, directly or indirectly, to make the same bid for any public contract.[5]

Commission's counsel *conceded* that competitors have not agreed on the prices to be submitted in any bids.[6]

There are no instances in the record where any of the respondent companies in Northern California who bid in response to invitations of public agencies ever withdrew or corrected a bid or ever attempted to do so, either before or after the opening.[7]

[D. Pricing—NRA.

1. Price Filing—Commercial

NRA Code provisions for open price filing and the activities of the Code Authority in connection therewith are set forth in Part III, p. 617, *supra*. This evidence shows that the language of the Code placed no restrictions upon the types of prices that could be filed and that the Code

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[3] (R) Tr. 28049, 37581-82.

[4] Answer of Commission in Opposition to Motion for Leave to Adduce Additional Evidence.

[5] Calaveras: (R) Tr. 42854.
Santa Cruz: (R) Tr. 42864.
Pacific: (R) Tr. 42838-39.
Yosemite: (R) Tr. 42846.

[6] (R) Tr. 24085, 27012-13, 27016.
See also Fdgs., Pars. 7(b) and 9(e), and Part II C, pp. 227, 230.

[7] Cf. Fdgs., Par. 9(d).

Authority accepted any price filed provided it was sufficiently definite in its terms and conditions to furnish competitors, the trade and the buying public with accurate information. Shelby, Vice President of Calaveras testified to the same effect.[1]

Reiter, who was formerly Chairman of the Code Authority, testified that the Code Authority notified members that mill prices might be filed.[2]

In evidence is a memorandum dated June 22, 1934 which was identified by Commission's attorney-witness, McIntyre, as having been prepared by him from the official files of the Code Authority.[3] This document consists of tabulations which list the county seats in each state (several thousand in all) and opposite each is a figure which purports to show the prices filed for each of the listed destinations by each of the manufacturers during and pursuant to, the operation of the open price plan under the Code.[4] The tabulations do not show the date of filing of the various prices by the respective companies nor do they show any of the changes in prices filed from time to time and the dates thereof. Among these are tabulations of Portland Cement prices for the following respondent and non-respondent manufacturers on the Pacific Coast:[5]

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[1] (C) Tr. 8710-11.

[2] (C) Tr. 3811-13.

[3] (C) Tr. 2743, 5372.

[4] A notice from the Code Authority to members of the Industry dated December 8, 1933, reads: "Your attention is directed to Article Nine, Section One of Cement Code which requires that all members of industry shall file by December Twelfth with Code Authority its prices and all terms and conditions of sale for its regular and modified portland cements. Your price list so filed should include your prices to every point of delivery which you normally quote and should be sent promptly to the Code Authority care Cement Institute Conway Building Chicago, Illinois." (Com. Ex. 910 A)

[5] Com. Ex. 408 H, I, J, K.

California	Nevada
Calaveras	Calaveras
Cowell	*Cowell*
Pacific	Pacific
Santa Cruz	Santa Cruz
Yosemite	Yosemite
Beaver	
California	California
Monolith	Monolith
Riverside	Riverside
Southwestern (Victorville)	Southwestern (Victorville)

Washington	Oregon
Superior Portland	Beaver
Northwestern Portland	Oregon
Olympic	Calaveras
Spokane	*Cowell*
Lehigh (Metaline Falls)	Pacific
Pacific	Santa Cruz
	Yosemite
Monolith	Monolith

A letter from the Code Authority to Beaver, dated June 1, 1934, relative to notification of new prices filed for certain towns, states:

> "Our usual practice is to notify only those members of the industry who have filed a destination price with us of any change in that destination price was followed in this case."[6]

Monolith wrote to the Code Authority on April 12, suggesting that it require members to mail copies of their price lists to competitors at the same time such price lists are broadcast to the trade.

The Code Authority's reply of April 17 reads:

> "In our opinion we do not have the right to require members of the Industry to do as you suggest. As a matter of fact, price lists as used on the Pacific

[6] Com. Ex. 910 B.

Coast are not in general use in the Industry and are not used to our knowledge in the states of Kansas and Nebraska, specifically referred to. The practice in the East, the South and the Middle-West is to broadcast quotations on quotation forms carrying only the price applicable to the destination of the customer to whom the quotation is sent.

Under these circumstances, we believe that our best method of serving you in the future, as in the past, is to disseminate information on price filing as promptly as possible after receipt of such information in this office.'[7]

a. Complaints

In evidence are various letters relating to complaints filed with the Code Authority by members on the Pacific Coast charging competitors with violations of the price filing provisions of the Code, either in quoting prices not on file or in giving rebates, such as the following:

In a letter dated March 29, 1934, Pacific complained that less-than-carload prices had been filed by Monolith, Santa Cruz and Yosemite for certain destinations at which they had no warehouse, and instead of storing the cement in a public warehouse they arranged with a local dealer to store it, allowing him a handling charge. Pacific contended that this rental allowance, if not filed with the Code Authority, amounted to a rebate in violation of the Code.[1] The Code Authority replied that this method of sale might be construed as a violation if the rental paid is so great as in fact to constitute a rebate.[2]

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[7] Com. Ex. 984 D.

[1] Article X, Sec. 4(k): "* * * The furnishing of articles or facilities of a definite physical nature, whether by way of loan, lease, gift, or otherwise, resulting in monetary benefit to purchasers or users is discriminatory and shall constitute unfair competition." (Com. Ex. 557)

[2] Com. Ex. 1040 B-C.

The Code Authority on April 17, 1934 notified Pacific that complaint had been filed against it charging violation of Art. IX, Sec. 2 of the Cement Code, as follows:

> "That, on April 10 you bid to Crater Lake National Park on 450 barrels of cement at $1.60 per barrel (presumably in bulk), f.o.b. Redwood Harbor, California.
>
> The lowest price on file with the Code Authority on April 10 was $2.40 per barrel in cloth, f.o.b. Redwood Harbor, California."[3]

b. Truck Filings

The Code Authority at an early date took the position that if prices, terms and conditions covering truck delivery were filed with the Code Authority by a member of the Industry and followed by him, such sales were in entire compliance with the Code.[1]

Reiter testified that from his Code Authority experience California members were very active in filing prices delivered by truck.[2]

Superior Portland wrote the Code Authority on February 3, 1934 regarding a filing by Monolith, to which the Code Authority replied on February 6:

> "As the Code now stands, there is nothing to indicate that prices filed should be for carloads only. In fact, you will remember that at several of the meetings a considerable discussion has been held on prices f.o.b. trucks and we have several prices filed with us f.o.b. member's mill for truck loading.
>
> It is, therefore, my opinion that this provision of Monolith's sale of LCL lots, f.o.b. price stated, dock or warehouse, is not in violation of the Code."[3]

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[3] Com. Ex. 984 E.

[1] Com. Exs. 633 B, 1006 A: Minutes of meetings of Code Authority, Jan. 10, 1934 and April 10, 1934.

[2] (C) Tr. 4130.

[3] Com. Ex. 1006 B.

Knappenburger of Oregon testified that Oregon's policy of delivering by truck from their Oswego mill was occasioned by a filing of Monolith that they would deliver truckloads of 65 barrels at the carload price.[4]

A notice dated May 9, 1935 from the Code Authority to interested member companies reported a filing by Santa Cruz as follows:

> "Member has filed the following truck conditions applying to their Northern California, Washington and Oregon price lists.
>
> Under our established prices in Northern California we reserve the right to make delivery in truckload lots of one hundred barrels and in Oregon and Washington in order to comply with established traffic regulations of seventy-five barrels.
>
> Member's filing further provides for deliveries in minimum quantities as stated above to a dealer's warehouse or to any location within a dealer's normal sales area, at the prices shown in lists in which case prices apply to cement deliveries alongside trucks and destination price includes transportation charges. Such delivery to be made at one destination only."[5]

The above filing was clarified by Santa Cruz subsequently to mean "delivered to dealer's warehouse or jobsite alongside trucks".[6]

On one occasion the Code Authority ruled that sales at truck prices that had not been filed were in violation of the Code. This grew out of a complaint that had been filed against Calaveras and *Cowell* charging them with permitting trucking from their mills without provision for it being filed.[7] *Cowell's* reply of March 23, 1934 to the Code Authority reads, in part:

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[4] (C) Tr. 8510.

[5] Resp. Exs. 25, 28.

[6] Resp. Exs. 26, 27.

[7] Com. Ex. 1003 H.

"Please be further advised that we earnestly disapprove of trucking from cement mills as you cannot have fair competition in competition with broken down trucks as against railroads. Furthermore the railroads of the country need the business but we have only followed our competitors and are ready to quit trucking at any time that they do. By our competitors I mean the Calaveras Cement Co. and the Pacific Portland Cement Co."[8]

The Code Authority forwarded the complaint on April 30, 1934 to Murray, Deputy Administrator of NRA, for further handling in order to strengthen compliance with the Code.[9]

The Code Authority received and filed all truck prices provided they were sufficiently definite for competitors to meet and did not violate any other provisions of the Code.[10]

On May 16, 1935 Calaveras filed with the Code Authority, effective May 21, certain trucking conditions whereby it would ship by rail to the destinations in California and Nevada shown in its price list and allow the dealer the cost of hauling the cement from the railroad to his warehouse or to the site of jobs within normal delivery limits. This was done to meet the competition of companies trucking direct.[11] This filing was criticized by *Cowell* as being indefinite. Reiter, Chairman of the Code Authority informed Shelby, Vice President of Calaveras, of the attitude of the Code Authority by telephone, as follows:

"So that Mr. Shelby would understand fully our attitude toward his filing I read him our wire to Mr.

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[8] Com. Ex. 1009 B.

[9] Com. Ex. 1009 D.

[10] Reiter, *supra*, Tr. 17003, 17030.

[11] Shelby, Vice President, Calaveras (C) Tr. 8699-700. Resp. Exs. 29, 32, 33.

George dated May 23 without disclosing to whom the telegram was sent. I told Mr. Shelby that I now found it necessary to refer our action in accepting his filing to the Code Authority members for approval or disapproval. He asked that I advise the Code Authority members that his filing was intended to meet in a manner available to him truck conditions filed by his competitors of which he did not approve, and in fact that he objected to truck delivery in Northern California. He further asked me to advise the Code Authority that he intended to make only such allowances to dealers for truck delivery of cement as would correctly represent the cost of such delivery and to make such investigation in each case as would be necessary to allow him to make the proper allowance.

I pointed out to Mr. Shelby that he must realize that however careful he was in making such allowances competitors would never be convinced that a part of such allowance did not actually represent a rebate and that in case of a filed complaint his defense against a charge of rebate would be difficult."[12]

Reiter wrote Calaveras on June 6 in part as follows:

"* * * your filing of truck conditions in California and Nevada reported to interested Members of the Industry on May 17 was referred to members of the Code Authority for their opinion as to the propriety of accepting such filed conditions under our Code.

Since that time the Supreme Court decision of May 27 leaves us without authority but we feel that you and others will be interested in knowing the opinion of the Code Authority, which will be stated as if our amended Code was still in effect.

The majority of the Code Authority feel that your filing should not have been accepted by this office and should (the Code being effective) be cancelled from our files. This opinion is based on Article VIII, Section 1 of the amended Code which requires that

[12] Com. Ex. 278 A-B: Letter, Reiter to Members of the Code Authority dated May 27, 1935.

> 'Each Member of the Industry shall file * * * all of his prices, discounts, allowances. * * *' "[13]

In reply to an inquiry from Yosemite relative to the above opinion of the Code Authority, Reiter stated that such filing "would have been in accordance with the Code had the Member filing specified allowance for truck delivery to be made to dealers in each case."[14]

Calaveras on July 24, 1935 notified its Northern California dealers that it was discontinuing its policy of absorbing the cost of delivery to the job site since it has learned from salesmen traveling the territory that other cement companies were now confining their truck deliveries to the dealers' warehouses, and that the practice of making deliveries directly to the projects under construction has been discontinued.[15]

2. Price Filing—Sealed Bids

Some members of the Industry located in California and Oregon filed with the Code Authority in March 1934 as a condition of sale a provision that

> "Cement will be quoted and sold the United States Government and the Metropolitan Water District of Southern California for any one specific project, whose total cement requirements are at least 250,000 barrels, at prices and upon terms which will be made upon formal bid request by either of the foregoing bodies."

The Code Authority voted that its Chairman notify the companies making this filing that it could not be accepted by the Code Authority and that the provisions of the Code relative to filing prices applied to the United States Govern-

[13] Com. Exs. 560, 1231.

[14] Com. Exs. 278 E-F, 819-2 B.

[15] Shelby, *supra* (C) Tr. 8700-01.
Com. Ex. 1269.

ment and the Metropolitan Water Districts of Southern California as well as other purchasers of cement.[1]

At a meeting of the Board of Trustees of the Cement Institute, February 14, 1935, a letter from California and a telegram forwarded by the Deputy Administrator of the NRA, in connection with the Los Angeles Flood Control District, were brought to the attention of the Board. After discussion, it was the opinion of the members of the Code Authority present that no violation of the Code is in question as the Cement Code does not prohibit a cement manufacturer from quoting prices f.o.b. mill, provided there is compliance with respect to filing such prices.[2]

BONNEVILLE DAM. There is no evidence that Government Proposals were handled co-operatively by respondents either before or after bids were submitted.[3]

The NRA Code became effective on December 7, 1933. On March 23, 1934 bids were to be opened on 300,000 barrels of cement for the Bonneville Dam. Prior to the opening of bids, certain respondents requested the Cement Code Authority for a ruling on their proposed methods of figuring bids. The bidders were concerned as to violations of the Industry's Code as each bidder was required to make an affidavit that its bid was in compliance with terms of Code for Cement Industry.[4]

On March 17, 1934 the Vice President of Pacific telegraphed the Chairman of the Code Authority:

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[1] Com. Ex. 987-D-E: Minutes of Meeting of Code Authority, March 13, 1934.

[2] Com. Ex. 622 E.

[3] Cf. Fdgs., Par 8(1).

[4] Beaver and Oregon, see Com. Ex. 159(4).
Superior Portland, see Com. Ex. 159(14), (25); see also Com. Ex. 161 A, Par. No. 1.

[Italicized part quoted in Fdgs. Par. Eight (l)]

*"REFERRING PHONE MESSAGE DATE WITH YOU AND YOUR ASSISTANT PERTAINING APPLICATION LAND GRANT RATES STOP SOUTHERN CALIFORNIA MILLS INSISTED ON MAKING PRICES WHERE LAND GRANT RATES INVOLVED STOP BASIS TO USE WAS LIST PRICE AT DESTINATION LESS COMMERCIAL FREIGHT RATE STOP ON LARGE ORDER AT NOGALES OPENED EARLY PART OF FEBRUARY CEMENT MANUFACTURERS BID ON THIS FORMULA AND DEVELOPED THAT THROUGH APPLICATION OF LAND GRANT RATES IT MADE CALAVERAS MILL APPROXIMATELY TWO CENTS BARREL LOW AND THEY SECURED BUSINESS STOP IT WAS THEN DECIDED THE ONLY WAY TO QUOTE GOVERNMENT PROJECTS WHERE LAND GRANT OR OTHER SPECIAL RATES WERE USED WHICH WERE LOWER THAN PUBLISHED RATES AS CONTAINED IN RAILROAD COMPANY TARIFFS THE FOLLOWING FORMULA SHOULD BE USED STOP TAKES DESTINATION PRICE DEDUCT FROM ALL INTERESTED MILLS THEIR COMMERCIAL FREIGHT RATE THEN ADD FOR COMPARATIVE PURPOSES THEIR LAND GRANT OR SPECIAL RATE APPLICABLE WHICH WILL GIVE COST TO GOVERNMENT AT DESTINATION FROM VARIOUS MILLS AND THE HIGHEST RATED MILL IF THEY WERE INTERESTED WOULD HAVE TO DEDUCT FROM THEIR MILL PRICE THE DIFFERENCE TO EQUALIZE WITH THE LOWEST RATED MILL AND THIS HAS WORKED OUT IN SATISFACTORY MANNER TO INTERESTED PARTIES FOR THE REASON THAT THE PRICES SO ARRIVED AT AT THE VARIOUS MILLS PLUS RATE GOVERNMENT WOULD PAY WOULD MAKE THE TOTAL PRICE AT DESTINATION STOP THE GOVERNMENT IS CALLING FOR BIDS AT BONNEVILLE OREGON OPENING MARCH TWENTY THIRD AND THIS FORMULA WAS SUGGESTED TO OREGON MILLS AT CONFERENCE AT SAN FRANCISCO FRIDAY BUT THEY CLAIM IN THEIR OPINION PROPER METHOD TO USE WOULD BE DESTINATION PRICE LESS THE COMMERCIAL OR LAND GRANT RATE AS THE CASE MIGHT BE WITH FREIGHTS EQUALIZED WITH THE LOWEST RATED MILL STOP WILL YOU PLEASE WIRE US FIRST THING MONDAY MORNING SO THAT WE CAN NOTIFY INTERESTED PARTIES HOW WE SHALL FIGURE BONNEVILLE BID BASED BACK TO A MILL PRICE WHICH IN ALL CASES IN OUR OPINION THE MILL PRICE MUST BE THE DIFFERENCE TO EQUALIZE WITH THE LOWEST RATED MILL STOP ALSO APPRECIATE IF ASCERTAIN AND WIRE WHAT MILL PRICE CALAVERAS AND MONOLITH ARE GOING TO USE STOP *** ***"* (Com. Ex. 159 (1), (2))

On the same date Beaver and Oregon telegraphed the Code Authority:

[Italicized part quoted in Fdgs. Par. Eight (l)]

"BIDS ON THREE HUNDRED THOUSAND BARRELS IN BULK FOR BONNEVILLE DAM ARE INVITED FOR MARCH TWENTY THREE STOP ONLY PRICE NOW FILED IS TWO FIFTY SIX DOLLARS FOB CARS BONNEVILLE LESS TEN CENTS

CASH STOP QUESTION ARISES AS TO APPLICATION OF LAND GRANT RATES WHICH AS USUAL CANNOT BE DEFINITELY DETERMINED BUT RANGE IN VARYING AMOUNTS UNDER COMMERCIAL ALL RAIL RATES OF FROM FOUR CENTS PER BARREL FROM OSWEGO NEAREST MILL TO JOB TO APPROXIMATELY FIFTY NINE CENTS UNDER PER BARREL FROM MONOLITH FARTHEST MILL STOP YOUR GENERAL LETTER OF MARCH SECOND ADVISES THAT IN COMPUTING DESTINATION COST TO GOVERNMENT WHERE IT IS DESIRED TO ARRIVE AT MILL BASE PRICE SO THAT SHIPMENT MAY BE MADE ON GOVERNMENT BILL OF LADING LAND GRANT RATES SHALL BE DEDUCTED FROM DESTINATION PRICE TO MILL AND NOT COMMERCIAL FREIGHT RATES STOP COMPETITION WITH OREGON COMPANIES BY CALIFORNIA COMPANIES IS BY RAIL AND WATER SHIPMENTS ALL RAIL COMMERCIAL FREIGHT RATES ON FILE ARE SO HIGH AS TO BE PROHIBITIVE BUT THE CONTENTION IS NOW MADE THAT DEDUCTION OF ALL RAIL COMMERCIAL RATES SHOULD BE MADE FROM DESTINATION PRICE TO ARRIVE AT MILL PRICE FOR MILL DELIVERY TO GOVERNMENT FOR SHIPMENT ON GOVERNMENT BILL OF LADING STOP THIS SEEMS CONTRARY TO THE SPIRIT IF NOT THE LETTER OF THE CODE AND MAKES POSSIBLE AS MANY PRICES TO THE GOVERNMENT AS THERE ARE MILLS BIDDING WITH DISTINCT ADVANTAGE TO MILL MOST REMOTE FROM JOB STOP *AN IMMEDIATE RULING BY THE CODE AUTHORITY TO ALL CALIFORNIA OREGON AND WASHINGTON MILLS WHICH WILL PROVIDE A METHOD OF BIDDING EQUITABLE TO ALL WILL BE GREATLY APPRECIATED OTHERWISE WE FEAR MANY VIOLATIONS OF THE CODE WILL BE APPARENT WHEN BIDS ARE OPENED ON THE TWENTY THIRD STOP.*" (Com. Ex. 159 (3), (4))

Pacific, on March 19, 1934, telegraphed the Code Authority filing a price of $1.60 per barrel f.o.b. Redwood Harbor less 10¢ cash discount.[5] On March 20, 1934, the Code Authority acknowledged receipt of Pacific's price and stated that it was "operative March twenty-fifth according to Code",[6] whereupon Pacific by reply telegram requested that its price of $1.60 be cancelled "as it was only intended for Bonneville Dam job" (bids to be opened March 23rd).[7]

Beaver under date of March 22, telegraphed the Code Authority advising that it was issuing a supplement to its

[5] Com. Ex. 159(6).

[6] Com. Ex. 159(7).

[7] Com. Ex. 159(8).

price list making immediately effective a provision intended to meet the competition of the present basing price named in Oregon's price list of February 17, as follows:

> "WE WILL BID ON CEMENT * * * FOR USE ON BONNEVILLE DAM FOR BULK CEMENT * * * F.O.B. CARS OUR PLANT AT GOLD HILL, OREGON * * * A PRICE WHICH INCREASED BY THE LAND GRANT RATE TO BONNEVILLE WILL EQUAL THE NET DESTINATION COST PER BARREL * * * OF CEMENT SHIPPED FROM OSWEGO OREGON AT $2.20 PER BARREL F.O.B. CARS OSWEGO PLUS THE LAND GRANT FREIGHT TO BONNEVILLE".[8]

The Code Authority wired Beaver that its filing could not apply since prices must be on file for five days prior to use, and there was no destination cost on file for Beaver to meet.[9]

Bids opened March 23, 1934 were:

	F.O.B. Bonneville	F.O.B. Mill (equivalent to 2.5307296 Bonneville)[10]
Beaver	$2.56	$2.0419296 — Gold Hill
Calaveras	2.5307296	1.65338 — Kentucky House
Cowell	No bid	1.7855728 — *Cowell*
Monolith	2.56	1.2963216 — Monolith
Oregon	2.56	2.20 — Oswego
id.	2.56	2.0419296 — Lime
Pacific	No bid	1.786588 — Redwood Harbor
Santa Cruz	No bid	1.72436 — Davenport
id.	No bid	2.2487196 — Portland[11]

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[8] Com. Ex. 159(16-17).

[9] Com. Ex. 159(18, 22): Telegrams to Beaver, March 22 and 23. Com. Ex. 159(20, 21): Telegram from Beaver, March 22. Fdgs., Par. 8(1).

[10] Com. Ex. 159(40): Letter, Pacific to Rader, April 3, 1934. Cf. Fdgs., Par. 8(1).

[11] Com. Ex. 159(23, 30, 40);
Resp. Ex. 232 I-J: Calaveras' bid.
Resp. Ex. 233: Abstract of bids.

On March 26, 1934 Santa Cruz telegraphed the Code Authority that under the formula sent out by the Code Authority[12] on March 19 Oswego was low with a $2.20 mill base and a land grant rate of .3307296 (376# x $.87796[13]) making a delivered price of $2.5307296, and that according to the railroad Calaveras' land grant rate from Kentucky House is $.7226344 which would have made a mill price of $1.8080952 ($2.5307296 less $0.7226344) whereas Calaveras bid $1.65338 or about 15¢ lower. The telegram continues:

[Italicized part quoted in Fdgs. Par. Eight (D)]

"INASMUCH AS EACH BIDDER WAS REQUESTED TO MAKE AFFIDAVIT THAT ITS BID WAS IN ACCORDANCE WITH TERMS OF CODE FOR THE CEMENT INDUSTRY SHOULD NOT CALAVERAS BID BE DISREGARDED."[14]

The Code Authority replied to Santa Cruz on March 29 as follows:

"ANY MEMBER OF THE INDUSTRY WHO SUBMITS A BID WHETHER FOB MILL OR FOB DESTINATION AT PRICES WHICH SHALL NOT HAVE BEEN ON FILE WITH THE CODE AUTHORITY AT LEAST FIVE DAYS PRIOR TO DATE SUCH BID IF SUBMITTED IS IN VIOLATION OF ARTICLE NINE OF CEMENT CODE STOP ANY MEMBER OF THE INDUSTRY MAY MEET ANY DESTINATION PRICE WHICH SHALL HAVE BEEN FILED WITH CODE AUTHORITY BY ANY OTHER MEMBER NOT LESS THAN FIVE DAYS PRIOR TO DATE SUCH PRICE WAS USED STOP INFORMATION JUST RECEIVED INDICATES SEVERAL BIDS HAVE BEEN SUBMITTED FOR BONNEVILLE LETTING WHICH ARE NOT IN CONFORMITY WITH REQUIREMENTS OF CODE AS HEREINBEFORE SET OUT STOP OUR LETTER MARCH SECOND APPARENTLY BEEN MISINTERPRETED OR MISUNDERSTOOD SINCE ANY USE OR APPLICATION THEREOF BY ANY MEMBER NOT IN CONFORMITY WITH THE CODE AS ABOVE DESCRIBED IS ILLEGAL UNDER THE CODE ITSELF AND IN VIOLATION OF EXECUTIVE ORDER ISSUED BY THE PRESIDENT UNDER DATE MARCH FOURTEENTH STOP THIS NOTICE IS SENT FOR YOUR INFORMATION SINCE IT WOULD BE ILLEGAL FOR ANY DEPARTMENT OF THE

[12] Com. Ex. 159(38): Letter, Pacific to Rader, Apr. 3, 1934.

[13] Com. Ex. 159(35): Letter, 3/31/34, Southern Pacific RR to Pacific.

[14] Com. Ex. 159(24-25). Fdgs., Par. 8(1).

GOVERNMENT TO AWARD ANY CONTRACTS UNDER BIDS WHICH WERE IN VIOLATION OF EITHER THE CODE OR THE EXECUTIVE ORDER ISSUED BY THE PRESIDENT UNDER DATE MARCH FOURTEENTH." (Com. Ex. 159 (27-28))

Monolith on March 31 telegraphed a protest to the Code Authority on the bids of two mills.[15] This protest was forwarded by the Code Authority on April 4, 1934 to the Compliance Division of NRA.[16]

On April 10, 1934 the Chairman of the Code Authority telegraphed Murray, Deputy Administrator, National Recovery Administration Department:

"THE ONLY PRICES ON FILE WITH THE CODE AUTHORITY APPLICABLE TO BONNEVILLE LETTING MARCH TWENTY THIRD ARE TWO DOLLARS FIFTY SIX CENTS BULK FOB BONNEVILLE AND TWO DOLLARS TWENTY CENTS BULK FOB OSWEGO OREGON STOP ANY BIDS SUBMITTED WHICH DO NOT RESULT IN COST TO THE GOVERNMENT IDENTICAL WITH THE AFORESAID PRICES TAKING INTO ACCOUNT THE LOWEST FREIGHT RATES AVAILABLE TO THE GOVERNMENT FROM OSWEGO TO BONNEVILLE ARE NOT COMPETITIVE AND THEREFORE NOT HAVING BEEN FILED WITH CODE AUTHORITY ARE IN VIOLATION OF THE CODE AND SHOULD NOT BE CONSIDERED STOP" (Com. Ex. 159(55))

Murray on April 13 wrote to the Secretary of War:

[Italicized part quoted in Fdgs. Par. Eight (I)]

"The Administrator for Industrial Recovery has been requested to rule whether a bid of the Calaveras Cement Company, of San Francisco, California, for the purchase of three hundred thousand (300,000) barrels of Portland Cement for the Bonneville, Oregon, dam project, is in violation of the Code of Fair Competition for the Cement Industry, and hence, under the Executive Order of March 14, 1934, not to be accepted.

You are informed that the Administrator for Industrial Recovery has found that the bid of the Calaveras Cement Company did not comply with the

[15] Com. Ex. 159(45-46).

[16] Com. Ex. 159(50-51).

Code. Inasmuch as nearly all the other bids have been found to be in violation of the Code, it is recommended that all bids be rejected."[17]

The War Department notified the Code Authority that all bids were rejected and work would be readvertised.[18] The work was readvertised for opening on May 17, 1934.[19] Alternate bids were requested f.o.b. or f.o.b. cars, barges or trucks at Bonneville, Oregon.[20] The land grant rates to Bonneville from 14 mills located in Washington, Oregon and California were supplied by the Government with the invitation to bid.[21]

A price of $2.02 per barrel in bulk f.o.b. cars or barges, Bonneville, Oregon was filed with the Code Authority.[22] This price was 54¢ lower than the price filed for the March 23, 1934 letting.[23] To determine the f.o.b. mill price for invoicing, the Government was to deduct the land grant rate or commercial rate, whichever was the lowest.[24]

The Bidders were:[25]

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[17] Com. Ex. 159(56).
Fdgs., Par. 8(l).

[18] Com. Ex. 159(59).

[19] Com. Ex. 161 A: Invitation to bid.

[20] Com. Ex. 161 F: *Supra.*

[21] Com. Exs. 163 A-B: Letter, 5/2/34, War Dept. to Code Authority, 161 B.
Par. 14: Invitation to bid.

[22] Com. Ex. 163 I: Telegram, 5/16/34, Code Authority to Oregon.

[23] Computed.

[24] Com. Ex. 163 H: Telegram 5/16/34, Oregon to Code Authority; 163 N: Letter, 5/17/34, to Engineers submitting Oregon's bid; 163 P: Letter, 5/19/34, Code Authority to Ideal listing prices filed for Bonneville.

[25] Com. Ex. 162 A-C: Tabulation of bids.

	f.o.b. cars Bonneville	f.o.b. barges Bonneville
Beaver	$2.02	$2.02
Calaveras	Id.	no bid
Monolith	Id.	2.02
Oregon	Id.	2.02
Pacific	Id.	no bid
Santa Cruz	Id.	2.02
Yosemite	1.2357392 f.o.b. mill Bid rejected	no bid
An Importer of foreign cement	no bid	1.90 Bid Rejected

The award was made to Beaver and Oregon on the basis of the Government's interest in that the location of their mills would facilitate inspection and handling of shipments.[25]

Shelby, Vice President of Calaveras, was examined about its low bid as follows:

> "Q. What was the situation, as you recall it, Mr. Shelby, in regard to your first bidding on the Bonneville Dam project in 1934, whereby you, I believe, were low bidder on the first bidding? A. Yes, sir; we were the low bidder.
>
> That was a question by the use of the land-grant deduction. The land grant figured on that—to be figured on that job—was from Roseville, California, to Portland, Oregon. The Government contended that the deduction should be made near the Klamath Falls route. They have two routes into Portland; Southern Pacific claimed it should be the other way. We had some controversy with the Government about proper payment, or, rather, the deduction of bills that they presented.

[25] Com. Ex. 162 B: *Supra.*

> Instead of taking what the Southern Pacific thought they should have, they took the one the Government contended they should have, which meant that the land-grant deduction was greater from our mill than those from the other mills who figured the actual route." (Tr. 8709)

GRAND COULEE DAM. Commission's witness Taylor testified that bids were opened by the Bureau of Reclamation February 21, 1935 for 10,000 barrels of cement in cloth, delivery at Odair, Washington, for use on Grand Coulee Dam. The bidders were Calaveras, *Cowell*, Lehigh, Monolith, Northwestern Portland, *Olympic*, Pacific, Santa Cruz, Spokane, Superior Portland and Yosemite, and all bid the destination cost which was on file with the Code Authority, $3.17 per barrel f.o.b. Odair with control clause, less sack allowance and cash discount of 50%, making a net destination cost of $2.67. This was 36¢ per bbl. lower than the current commercial price filed for Odair.[27] Taylor testified that these bids were rejected because the control clause was considered as depriving the government of the advantage of the land grant rate.[28]

Bids were re-advertised to be opened April 17, 1935 and an opinion of the Controller General with respect to the use of a government destination cost was attached to the invitation. In reply to an inquiry from Santa Cruz regarding this opinion the Code Authority wrote as follows:

> "A Government Destination Cost for Odair, Wash., of $3.17 per barrel gross in cloth is filed with this Code Authority effective immediately and this Government Destination Cost was effective on February 21 at the time bids were previously taken. It is my understanding that this Government Destination

[27] Taylor, Asst. Chief of Eng. Div., U. S. Bureau of Reclamation (C) Tr. 255-57, 294; Com. Ex. 277 N, *infra;* Com. Ex. 2127: Monolith price list for Eastern Washington, Supp. No. 7, dated Feb. 8, 1935.

[28] Id. (C) Tr. 258.

Cost like all others secures to the Government the full advantage of land grant rates and it is in fact 36¢ per barrel lower than the commercial price filed with us f.o.b. Odair, Wash.

Our opinion, therefore, coincides with your own, namely, that the Comptroller General did not have before him a correct statement of facts upon which to base his opinion. We are referring this opinion to the Controller General to our Counsel and requesting Counsel's opinion for our guidance, but at this time you are advised that there is on file a commercial price f.o.b. Odair of $3.53 gross in cloth and a Government Destination Cost for that destination of $3.17 gross in cloth and that in our opinion any Member of the Industry bidding otherwise than either this commercial price or this Government Destination Cost without previously filing as required by our Code will be in violation thereof.'"[29]

On April 17th, Warner, Sales Manager of Colorado, wrote the Chairman of the Code Authority with reference to the Controller General's opinion in part, as follows:

"* * * I believe the industry is making a mistake in attempting to force the Government to pay this amount for this cement, which, as you know, is part of at least five million barrels to be used on that project.

Reading between the lines, you can readily perceive the desire which was back of General McCarl's opinion. For instance, he has been paying vouchers right along on contracts and bids to which the control clause had been attached and suddenly reverses himself on the written request of Secretary Ickes. The inference of course is obvious and I believe that the proper procedure would be to attempt to discuss the matter with the proper officials and arrive at a proper and suitable price, rather than force a Government destination cost of $3.17 which is manifestly too high.'"[30]

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[29] Com. Ex. 277 N: Letter, 4/12/35, Code Authority to Santa Cruz.

[30] Com. Ex. 277 P.

The Chairman of the Code Authority wrote to Warner on April 25, 1935 regarding a discussion with the Commissioner of the Bureau of Reclamation, in part as follows:

> "* * * The point of discussion so far as we are concerned is whether or not the Industry's method of bidding does secure to the Government the full advantage of land grant rates to which they are entitled as a matter of law. Mr. Harper, who did most of the talking, conceded that in most instances the Government did secure such advantage but made particular reference to special rates to the U. S. Government to be established after the letting at Odair with which he was particularly concerned.
>
> Mr. Harper also indicated that he believed the Government Destination Cost of $3.17 per barrel was too high and for the Code Authority he was told that this was a matter beyond their control, or in other words a matter of negotiation between the purchaser and the bidders. * * *"[31]

To which Warner replied on April 30, 1935 in part, as follows:

> "Feeling that the price was too high grew out of the fact that the Government had a blanket 17¢ rate from all of the mills in Washington to the Grand Coulee Project, with the exception of the Spokane mill from which the rate is 13¢. However, the general contractors were parties to this projected agreement on the part of the Northern Pacific and it seems that at the time these bids were taken the general contractors had not yet executed their part of the rate contract and consequently it turned out that this 17¢ rate was not yet in effect. Therefore, the nets showing mill returns of $2.02, based on this 17¢ rate, were erroneous.
>
> I believe the Government people now understand that the $3.17 Government destination filed cost was based on existing land grant rates which only returned the mills in Washington (other than Spokane) approxi-

[31] Com. Ex. 277 W.

mately $1.86 per barrel, which price apparently is not an unsatisfactory mill price on this 10,000 barrels of cement from the standpoint of the local Reclamation officials.

I give you this detailed information that you may know the circumstances which lead up to the conclusion that the filed price was too high."[32]]

Taylor testified that bids were again advertised for the Grand Coulee dam to be opened August 20, 1935[33] on 720,000 barrels of modified cement, 720,000 barrels of standard cement and 3,500,000 barrels of modified cement in bulk, and 650,000 tons of modified cement clinker. Bids were requested f.o.b. mill and f.o.b. Odair, Washington. Pacific bid f.o.b. destination. The others bid f.o.b mill, as follows:

Beaver	$1.40
Lehigh	$1.3796
Northwestern Portland	$1.3796
Olympic	$1.38
Spokane	$1.53
Superior Portland	$1.3796

All prices were less 10¢ cash discount.[34]

The Government had a special rate of 17¢ per cwt from all of the mills in Washington, except Spokane's mill at Irwin from which the rate was 13¢.[35] This resulted in a freight rate of 48.88¢ per barrel from Irvin and a freight

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[32] Com. Ex. 277 Y.

[33] Taylor, Asst. Chief of Eng. Div., Bur. of Reclamation (C) Tr. 262-69, 325-28, 1186-89;

[34] Com. Ex. 112 D: Tabulation of bids.
Com. Ex. 113: Invitation for bids, schedules, and specifications.

[35] Com. Ex. 277 Y: Letter, 4/30/35, Colorado to Code Authority.

rate of 63.92¢ per barrel from the other mills in Washington, as follows:

$1.53 —bid by Spokane f.o.b. Irvin
.4888—special rate

$2.0188—f.o.b. Odair
.6392—rate from other Washington mills

$1.3796—bid by other Washington mills f.o.b. mill[36]
1.38 —bid by *Olympic*, dropping fractions.

Bids on clinker were requested in order to determine the feasibility of establishing a cement processing plant at Grand Coulee Dam. The clinker bids were asked on a ton basis, but when that was reduced to a barrel basis, the comparison with cement was only 12¢ a barrel difference. The clinker bids being considered high and the cement bids being considered low and reasonable, the effect was to show the Bureau the unfeasibility of considering the construction of a processing plant.[37]

No award was made on a clinker item. Awards were made for cement as follows:

Bidder	Barrels
Superior Portland	2,000,000
Lehigh	600,000
Northwestern Portland	450,000
Spokane	400,000
Olympic	770,000[38]

The prices bid on cement clinker were lower on a comparative per barrel basis than the prices bid on finished cement, as shown in the abstract of bids:[39]

[36] As computed.

[37] Taylor, Asst. Chief of Eng. Div., Bur. of Reclamation (C) Tr. 330, 1227-28.

[38] Id., Tr. 268, 327.

[39] Com. Ex. 112 D.

	Bid per ton Clinker f.o.b. Mill	Delivered Cost Computed by Gov't	Bid per barrel Clinker[40]	Bid per barrel Cement
Beaver	$5.225 net	$10.4856 net	$0.987 net	$1.30 "
Lehigh	6.30 "	9.70 "	1.185 "	1.2796 "
Northwestern	6.30 "	9.70 "	1.185 "	1.2796 "
Olympic	6.30 "	9.70 "	1.185 "	1.28 "
Pacific[41]	5.05 "	11.0578 "	0.95 "	1.05974 "
Spokane	7.10 "	9.70 "	1.335 "	1.43 "
Superior Portland	6.30 "	9.70 "	1.185 "	1.2796 "

[The Bureau of Reclamation asked for bids "delivery f.o.b. cars at shipping point and/or f.o.b. cars at Almira, Washington" on 16,000 bbls. of cement for use on Grand Coulee Dam, reserving the right to deduct commercial freight cost in case of destination bids.[42] Bids opened March 19, 1934 were:

	Mill	Destination
Spokane	2.72	3.3792
Lehigh	—	3.3792
Northwestern Portland	—	3.69

Spokane and Lehigh bid the destination price on file with the Code Authority, which was predicated on the land grant rate. Northwestern Portland's bid was not qualified and, according to the Government's computation, resulted in the lowest destination cost.][43]

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[40] Computed on basis of 376 pounds to a barrel.

[41] Pacific bid 15.35 per ton for clinker and $3.09614 per barrel for cement, f.o.b. Odair, Washington, from which the Government computed the f.o.b. mill prices as above.

[42] Taylor, Chief of Eng. Div., Bur. of Reclam. (C) Tr. 1191. Com. Ex. 114 A, B: Memorandum of bids prepared by Taylor, dated April 12, 1934.

[43] Taylor, *supra*.

E. Trucking.

1. Extent of Trucking

There is no evidence of any refusal to permit trucking and no evidence of any discontinuance of trucking at any time with respect to any of the respondent companies in Northern California. The evidence with respect to the extent of trucking is as follows.

BURNS-CLARK DATA. The percentage of trucking in relation to total shipments from the mills in Northern California[1] during the four selected months for which figures are shown, as computed from answers to the Burns-Clark questionnaire, is as follows:

		Percent of Total Shipments				
Company	Mill	June 1929	Jan. 1928	June 1932	Jan. 1933	Com. Ex.
Pacific	San Juan Bautista[2]	5.5%	33.0%	—	—	972-1 B
Santa Cruz	Davenport	—	—	.85%	.32%	972-3 S

There is testimony as to the extent of trucking from the individual mills in Northern California as set forth hereunder.

Gay, General Manager of Santa Cruz, testified that delivery by truck at the customers request is a quite frequent thing. The larger percentage of delivery from Santa Cruz' plant is made by truck. Santa Cruz hires trucks. It does not own any trucks that deliver cement commercially.[3] Gay testified further that truck delivery is available to any

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[1] Does not include any deliveries in trucks owned, operated or hired by the producer. Com. Exs. 974-14 L, 15 Q, 15 R; 967-7 G, 7 X; 968-10 X, 12 D.

[2] Not operated since 1930.
Pacific delivers to customer's trucks at its Redwood Harbor mill. Com. Ex. 968-10 Y, 11 K.

[3] (C) Tr. 8648.

dealer or purchaser who wishes it. Santa Cruz has no fixed territory for truck delivery. The distance to which truck deliveries are made depends on how much the truckman will charge. In Gay's experience, truck delivery does not go much out of California. Two hundred miles is a very long limit for a truck to haul from the cement plants in northern California.[4]

Holmes, formerly Vice President of Yosemite, testified that during the time that he was with the Yosemite, during the first years of his term there, there was very little trucking done, and during the latter part of the time that he was with them, Yosemite had a connection with a large trucking firm that did virtually all of its trucking. Holmes testified further that Yosemite had some small amount of deliveries by truck in 1933, but it gradually grew in volume, and at the time that he left there it was possibly 25 per cent or maybe somewhat larger, of the volume moved by truck.[5]

Holmes was examined as to Yosemite's policy with reference to making delivery to customer's trucks at the mill, as follows:

> "*By Mr. Wooden*:
>
> Q. Did you permit customer's trucks to come to the mill to take delivery in trucks? A. I don't believe any of our customers owned their own trucks.
>
> Q. Did they send trucks? A. Sir?
>
> Q. Did you permit customers to send trucks to the mill to take delivery at your mill price? A. If some customer had a truckman that he favored, and if this truckman had the necessary insurance papers to protect us, we sometimes employed him the same as we would employ our regular trucker." (Tr. 8738)

Shelby, Vice President of Calaveras, testified that his company makes some sales to trucks that come to its mill.

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[4] (C) Tr. 8649-50.

[5] (C) Tr. 8738, 8759.

It also makes delivery itself by truck to some of the towns in the territory adjacent to its mill.[6]

George, General Manager of *Cowell*, testified that his company sells to dealers' trucks at its plant or warehouses for local consumption. *Cowell* has no company trucks. For possibly two years, about 30% of *Cowell's* shipments have moved by truck. When there are large jobs *Cowell* hires truckers, in which case it trucks considerable distances.[7]

2. Truck Prices

There is no evidence that any of the six mills in Northern California refused to sell cement for delivery to customers' trucks f.o.b. mill or ever imposed a surcharge of 15¢ or any other amount for loading customers' trucks at the mill. The evidence as to how prices have been calculated when delivery is made to the buyer's truck at the mill follows:

	Burns-Clark Questionnaires of 1935	Com. Ex.
Pacific:	"Mill base plus cost of containers, dealer discount and cash discount. No change in policy."	968-10 Y, 11 K, 12 E
Santa Cruz:	"We do not make delivery to buyers' trucks at our mill. No change in policy."	967-7 I
Yosemite:	"Change in policy March 1934. Permitted truck delivering from plant, instead of rail delivery only previously. To meet condition instituted by competitors."	967-7 Z

TESTIMONY

Gay, General Manager of Santa Cruz, testified that in Santa Cruz' price lists truck delivery is named at the company's option just to protect it in the event of some criti-

[6] (C) Tr. 8682-83.

[7] (C) Tr. 8775, 8779-80.

cism by a dealer, but that Santa Cruz usually does what the customer requests. The delivered price of Santa Cruz cement by truck is the same as when delivery is made via rail.[1]

Holmes, formerly Vice President of Yosemite, testified that Yosemite charged the same delivered price for shipment by truck that it did for shipment by rail. Holmes testified further that there was very little truck delivery in the days before Yosemite's plant became a base.[2]

Shelby, Vice President of Calaveras testified that there are some exceptions to his company's policy of quoting only on a delivered price basis. Calaveras sells to customers' trucks that come to its mill from the adjacent territory where there are no railroad facilities. Calaveras also makes delivery itself by truck to some of those towns. When Calaveras sells for truck delivery to towns where there is railroad service also it charges the same price as though the cement were delivered by rail.[3]

George, General Manager of *Cowell*, testified that his company sells by truck and by rail on a basis of delivered prices. *Cowell* sells to trucks on an f.o.b. mill basis sometimes for local consumption, in which case the dealers send trucks to the plant or warehouses to get the cement. The price for such sales is the regular price at the mill which is $2.20 in paper now, or $1.90 stripped.[4]

3. Comparative Cost of Truck and Rail Delivery

There is testimony by executives of several cement companies in Northern California as to the comparative cost of truck and rail delivery, as set forth hereunder.

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[1] (C) Tr. 8647.
Com. Ex. 1211.

[2] (C) Tr. 8738-39, 8765.

[3] (C) Tr. 8682-83.

[4] (C) Tr. 8775-76.

Gay, General Manager of Santa Cruz, testified:

"*By Mr. Wooden*:

Q. Do you find the delivery by truck substantially cheaper than delivery by rail? A. As I said before, that all depends; while the rates may be lesser at times from the mill to destination, there are other charges incidental to the loading of trucks and the unfixed hours at which they call at the plant requiring additional labor, that adds to the cost.

Q. But the truck rates, themselves, are substantially lower, are they not? A. At the present time there isn't very much difference.

Q. They have been substantially lower in times past? A. In the past; yes, sir." (Tr. 8648-49)

Holmes, formerly Vice President of Yosemite, and now Vice President of Calaveras, testified:

"*By Mr. Leisure*:

Q. And taking your experience with both companies, how does the cost of truck delivery compare with rail delivery? A. On the face of it, it sometimes looks as though it is slightly less expensive than rail delivery, but that is not true. There are a lot of intangible costs, higher loading costs, inconveniences at the mill due to uncertain arrival of trucks and such things as that. That, in my estimation, run the cost of trucking up somewhat higher than rail.

Q. And what do you say as to the cost of trucking in the North country, north of San Francisco? A. Just what portion do you mean? Do you mean on the Coast, or——

Q. In the mountains. A. The reason I ask that question, it is very difficult on the coastal region and some portions of the inland regions because of mountainous conditions.

Q. That is what I had reference to, because of the mountainous conditions. A. We object to delivery by truck in those regions.

Q. And how does it compare with the railroad? A. It comes to a cent per hundred pounds higher than rail rates, in those sections.

Q. In the mountain district. A. Yes. However, there is a customer, consumer-demand, to deliver by truck at your job sites, so we have to sometimes do that and absorb those costs." (Tr. 8760-61)

"*By Mr. Wooden*:

Q. Just on the basis of comparing the truck rates with the rail rates, alone; the truck rates were ordinarily considerably less, weren't they? A. I think not.

Q. What was your objection, if any, to making delivery to trucks at the mill without charging the rail base price, delivered price? A. I wish you would amplify that a——

Q. As I understand it, you wouldn't deliver to trucks except but on the basis of the rail delivered price? A. Well, in general, we didn't have any better rate from the truckmen than we had from the railroad. If we had to pay them as much as we did the railroad——

Q. You didn't permit the customer to send his own trucks, take the cement away from the mill, at your mill base price? A. I think I answered that question a while ago. We billed him at the destination price, and there was no saving in shipping by truck. Therefore, the truckman got the same amount of money that the railroad got.

Examiner Norwood: Well, under those circumstances, you didn't hesitate to deliver the cement at the mill, so that he could carry it off in his own trucks?

The Witness: I don't recall any dealers, or cement users, that owned their own trucks. They sometimes asked us to hire some favored truckman, which we did, as an accommodation at times, providing he had the proper insurance.

Examiner Norwood: Well, it was not against your policy to do that, was it?

The Witness: Why, I don't know that it was. I don't know as that ever came to issue.

By Mr. Wooden:

Q. Well, there was no saving in cost delivered by having somebody come with a truck? You wouldn't charge them the rail delivered price? A. That is right." (Tr. 8765-67).

George, General Manager of *Cowell*, testified:

"By Mr. MacIntyre:

Q. When you deliver cement to a dealer who sends his own trucks to your factory, and who buys at the $1.90 price strip, do you know what his delivered costs are when he carries it to his warehouse? A. Oh, approximately the same as the delivered price would be by any other truck. The thing is, it is a matter of convenience for them. Dealers out in the country have small trucks. Sometimes they stand around the yard with nothing to do, and it is convenient to let them go over to the mill and get a load of cement to fill in, but it costs them to operate those trucks.

Q. Do you know whether or not their delivered cost would vary from rail cost? A. Not a great deal; not a great deal." (Tr. 8776-77)

George testified further that *Cowell* does not experience any disadvantage in its manufacturing or shipping operations through delivery of cement to dealers' trucks at its plant. *Cowell* finds it is as easy to deliver to a truck as into a railroad car. Once in a while dealers complain to *Cowell* that they are delayed due to inefficiency or lack of facilities for loading their trucks on time.[1]

F. Water Delivery.

About 1936 Santa Cruz took advantage of the location of its plant on the Pacific Ocean and established a pier ex-

[1] (C) Tr. 8777-78.

tending 2650 feet into the ocean to a depth sufficient to moor its steamer, the SS "Santacruzcement". Cement is transported by air lines from the plant to the steamer and thence delivered in lots of approximately 40,000 barrels, to silos at Portland, Ore., and Alamada, Stockton and Long Beach, Calif., where it is pumped from the steamer. These silos are equipped with packing facilities and from them cement is distributed by rail or truck to various parts of the States of Washington, Oregon, California, Nevada, and Arizona.[1] The lower cost of its water transportation to the States of Washington and Oregon enables Santa Cruz to compete in those two states. The lower cost of its water transportation to Long Beach, Calif., enables Santa Cruz to make shipments to Arizona.[2]

Shipments of cement from California come into the State of Washington usually by water, although there have been many rail shipments from California.[3]

Neither Yosemite nor Pacific has operated its own ships or barges.[4] There is no further evidence with respect to the use of water transportation by, or its availability to, any of the mills in Northern California.

The Trial Examiner ruled that whether barge delivery was more or less expensive than rail delivery is not in issue, and rejected evidence with respect thereto.[5]

(See also this Part XVII-A, *infra*, p. 2738.)

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[1] Tr. 8612-13, 42859-60.
Com. Ex. 967-7 H.
Fdgs., Par. One (3h).

[2] Tr. 42862.

[3] Tr. 8433.

[4] Com. Exs. 967-7 G, 7 X, 8 M; 968-10 W, 12 D.

[5] Tr. 35698-703, 37133, 37135-37.

G. Diversions.

There is no evidence that any of the respondent companies in Northern California or any representative thereof ever had any communication with any traffic or railroad representatives with respect to the acceptance of bills of lading stamped with a prohibition against diversions, or ever participated in any discussions or consideration of such a matter and no evidence that any of the said companies ever used or agreed to use such a bill of lading stamp.[1]

There is no evidence that any of the respondent companies in Northern California ever used or agreed to use any provisions in its contract forms to prevent diversions, or ever took any measures whatsoever in order to eliminate diversions of cement shipments in transit. There is no evidence that any of the said respondents ever adopted or pursued any policy or practice with respect to diversion of its shipments of cement in transit.

H. Imported Cement.

There is no evidence with respect to zone, "arbitrary", area or other special prices to meet imported cement competition in any of the market territory of the Northern California companies and no evidence relating to boycotting or espionage by any of the said companies or any representative thereof.[1]

There is no evidence that any respondent company in Northern California ever took any steps or measures or ever adopted or pursued any policy or practice with respect to competition with imported cement, except as follows: [On July 13, 1933 members of the cement industry through the Cement Institute advised Gen'l Johnson, Ad-

[1] Cf. Fdgs., Par. 12 (d).

[1] Cf. Fdgs., Par. 12 (b), (c).

ministrator of the NRA that on August 1, 1933 an increase in wages and reduction in hours would be put into effect in order to increase purchasing power and employment.[2] Subsequently, and during the effective period of the NRA Code, Santa Cruz joined with Oregon in a protest against the dumping of foreign cement which was manufactured under conditions totally dissimilar to those under which domestic companies were operating.[3] Commission's witnesses, Wray and Miller, importers of foreign cement, both testified that importers did not operate under the standards of the NRA Code.][4]

For the evidence relating to the activities of the Tariff Committee of the Cement Institute on the Pacific Coast see Part XVII-B, *infra*, pp. 2808-10.

I. Limits of Marketing Areas.

The factors considered by the individual cement mill in Northern California in deciding where it will actively solicit business, as shown in the answers of the respective companies to the Clark-Burns Questionnaire, are as follows:

Pacific: "that geographical area in which freight rates permit maximum mill net and minimum freight absorption".[1]

Santa Cruz: "transportation costs".[2]

Yosemite: "favorable mill net and volume".[3]

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[2] Com. Ex. 634 F, K-M.

[3] Com. Ex. 644 H, K.

[4] (C) Tr. 7874; (C) Tr. 7481.

[1] Com. Ex. 968-10 Z, 11 K, 12 F.

[2] Com. Ex. 967-7 I.

[3] Com. Ex. 967-7 Z, 8 P.

Where large orders are involved, such as governmental work, Yosemite and Santa Cruz seek sales outside their usual market territory, which requires greater freight absorption.[4] Pacific does not seek such sales.[5]

Each of the Northern California companies has always actively solicited business in the whole territory in which its base plus freight would make the lowest delivered price.[6]

Santa Cruz has not made any shipments yielding mill nets in excess of its base price.[7] Neither Yosemite nor Pacific has made any shipments yielding mill nets in excess of its base price since August 1929. Prior to August, 1929 the only shipments made by Yosemite yielding mill nets in excess of the price at its railroad station were between Merced and Tulare in San Joaquin Valley.[8] Prior to August, 1929 Pacific made shipments in a few instances yielding mill nets in excess of the price at its railroad station where sales were made direct to consumer and no dealer discount was allowed.[9]

Santa Cruz' market territory has been affected by the use of water delivery as follows:

> "No change in method of transportation up to October 11, 1934, when we adopted system of handling cement in bulk by steamship.
>
> Up to October 1934 all cement was shipped from our plant by rail.

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[4] Com. Ex. 967-7 I, 7 Z, 8 P.

[5] Com. Ex. 968-10 Z, 11 K, 12 F.
Gay, General Manager, Santa Cruz (C) Tr. 8621.

[6] Com. Exs. 967-8 D, 8 I (Yosemite), 7 J, 7 M, 7 R (Santa Cruz); 968-11 C, 11 O, 12 I (Pacific).

[7] Com. Ex. 967-7 F, 7 G.

[8] Com. Ex. 967-8 N, 7 Y (base): Holmes, former Vice President (C) Tr. 8728-29.

[9] Com. Ex. 968-10 X, 11 I, 12 D.
Cf. Edgar, Par. 33(b).

Permitted us to extend our market to southern California and Arizona, which heretofore was not attractive because of high rail rates.''[10]

On Arizona sales Santa Cruz ships by boat to Long Beach and from there it has practically the same rail rates to Arizona points as the mills in Southern California; however, its total cost of delivery on Arizona shipments is greater than that of the Southern California mills.[11]

Prior to 1934 Santa Cruz shipped partly or wholly by water 43,094½ bbls. of cement yielding mill nets less than its base price per bbl, and 185 bbls. of cement yielding mill nets in excess of its base price per bbl., none of which was shipped in ships or barges owned or operated by Santa Cruz.[12]

The use of trucks for transportation has restricted Santa Cruz' market territory.[13]

Pacific's shipments were greatly affected by the establishment of new mills at Kentucky House and Merced in 1926 and 1927. Pacific's market territory has changed markedly as a result of conversion of the mills at Cowell, Merced, and Kentucky House from non-basing point mills to basing point mills on August 12, 1929.[14] Conversion of Pacific's mill from a non-basing point to a basing point was occasioned by competition and reduced Pacific's mill nets in a large portion of its normal market.[15]

Yosemite's market territory has been lessened by "changes in transportation rates"; "use of boats and trucks", "reduced mill nets", and by "reduced prices by

[10] Com. Ex. 967-7 K.

[11] Gay, General Manager, Santa Cruz (C) Tr. 8623-24.

[12] Com. Exs. 967-7 G, 972-3 S.
Cf. Fdgs., Par. 23(b).

[13] Com. Ex. 967-7 L.

[14] Com. Ex. 968-10 Z, 11 L, 12 F.

[15] Com. Ex. 968-12 B.

the nearest Southern California mill". Shipments by Yosemite yielding mill nets less than its base price have been largely concentrated in the San Francisco Bay area due to the volume of business available there.[16]

The net mill value of the shipments of mills in Northern California for a part, or all, of the years 1929, 1930 and 1931 is set forth in the Answers to the Commission's Questionnaire of 1931.[17] The selling costs per barrel of the companies in Northern California have increased due to additional competition and changes in the volume of sales.[18] George, General Manager, *Cowell*, testified that costs have increased decidedly.[19] Evidence offered on behalf of respondents as to the reasonableness or fairness of cement prices, and costs, profits and losses, was stricken or rejected by the Trial Examiner.[20]

J. The Cement Institute.

Reiter, former General Manager of The Cement Institute, testified that "there has never been a division office of The Cement Institute on the West Coast." He testified further:

> "Q. Regardless of the fact that there was no division office, did the Institute render any service to those Rocky Mountain and Pacific coast districts prior to N.R.A.? A. They rendered no service at all in districts 9, 10, 11 or 12 prior to N.R.A.

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[16] Com. Ex. 967-8 A, 8 B, 8 C.

[17] Com. Exs. 1267 E (Calaveras); 3166 D, G (Pacific); 3140 B, D (Santa Cruz); 3157 D, G (Yosemite).

[18] Com. Exs. 967-7 R (Santa Cruz); 8 I (Yosemite); 968-11 G (Pacific).

[19] (C) Tr. 8785.

[20] (R) Tr. 26394, 32062, 32329-30, 33886, 36081-82, 36424, 36759, 38850, 40126-27, 41456, 47462-64, 47470-99, 47504, 47518-23.

Trial Examiner Norwood: Rendered no service to local organizations, is that what you mean?

The Witness: To any members of the Cement Institute, your Honor.

By Mr. Leisure:

Q. And were any of those West Coast and Rocky Mountain Companies, were any of them members prior to N.R.A.? A. No, sir.'"[1]

1. Reasons for Membership

The respondent companies in the Northern California area first joined the Cement Institute in June,[1] 1933 with the advent of NRA in order to participate in the formulation of a Code for the Cement industry[2] because "it was the vehicle used during the period of the organization of the Code; a central clearing house",[3] and because "it was our understanding that we had to join the Institute to secure all of the provisions of the Cement Code as approved by the President in the latter part of 1933".[4]

The Code of Ethics of the Cement Institute had been cancelled before any of the Northern California companies became members and none of the said companies ever signed or used the Code of Ethics.[5]

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[1] (C) Tr. 16710-11.

[1] Calaveras first became a member in September, 1933.
Fdgs., Par. 1(k, 3a, 3h, 4a).
Resp. Ex. 2173 B-C; Tr. 8611.

[2] Gay, General Manager, Santa Cruz (C) Tr. 8611.

[3] Holmes, Vice President, Calaveras, and former Vice President, Yosemite (C) Tr. 8758.

[4] Keller, former Vice President, Pacific (C) Tr. 9133, 9168.

[5] Com. Exs. 611 D, 1033 A-B.
Resp. Exs. 2173 A-E, 2174 A-D.
Tr. 2809, 16699, 16927-29.
See also Part X-B (Sec. 2).

Henderson, President of Pacific, was designated a Trustee for District #11 at a meeting of the Board of Trustees of the Cement Institute, June 15, 1933, and was elected a member of the Code Authority on December 7, 1933.[6] Henderson resigned as Trustee and as a member of the Code Authority for reasons of health on January 11, 1934.[7]

A meeting of the cement manufacturers of the Northern and Central California area was held on June 20, 1933 to consider the proposed Code of Fair Competition for the Cement Industry.[8] A draft memorandum of this meeting prepared by McCarthy, Vice President of Pacific, for the information of Henderson, President of the same company, states that those present were Pacific, Santa Cruz, Calaveras, *Cowell* and Yosemite, and reads as follows:

> "After a thorough discussion and reading of the Code it was the sense of the meeting that the Code as a whole was satisfactory, and its adoption would be a distinct benefit to the entire industry.
>
> As a matter of suggestion the following proposals were made with the understanding that they would be sent to Mr. Henderson so that they might be considered at the general meeting in Chicago.
>
> * * * * * *
>
> In this Code of Fair Competition a number of matters are provided to be determined by a 'Board of Trustees' and by an 'Enforcement Committee'. But the Companies are of the opinion that due to peculiar and unusual conditions on the Pacific Coast and due to the great distances between the other companies and ourselves, these matters should be determined nearer at home by a Pacific Coast Regional Committee, and they therefore, recommend that such re-writing, both of the Code of Fair Competition and of the Articles of Association of the

[6] Com. Exs. 616 A-B, 2173 D.

[7] Com. Exs. 617 A, 618 B-C.

[8] Gay, *supra*, Tr. 8664, 8668.
Com. Ex. 556.

Cement Institute, be made as is necessary to constitute this committee and to substitute it for the Trustee and for the Enforcement Committee.

It was the opinion of all members present that this Pacific Coast Regional Committee should be elected by all the members of the Pacific Coast and the number to serve on the Committee was left open.'"[9]

[For the evidence relating to the NRA Code see Part XII, *supra*, p. 2099.]

2. Non-Use of Freight Rate Service

The Cement Institute never issued freight rate books for any of the territory in which the Northern California companies market cement and none of the respondent companies in Northern California has ever received or used any of the rate books that the Institute does publish.[1] Reiter testified that after revival of the Cement Institute [during the NRA period] no freight rate service was provided for Districts 11 and 12.[2]

In a memorandum dated July 10, 1936 addressed to Conn, President of The Cement Institute, relative to the Freight Rate Bureaus, Reiter said that "Districts 11 and 12 have a much simplified freight rate problem." Asked by Mr. Wooden what this means, Reiter testified:

> "I believe that all rates in that territory occur in one tariff, and, therefore, you do not have to search through a number of tariffs to find the applicable commercial freight rate or the lowest commercial freight rate, as you do in the eastern states or the southern states, I believe."[3]

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[9] Com. Exs. 1228-1229.

[1] Fdgs., Par. 8(c); Com. Ex. 595 C-E; Tr. 2809, 3154-56, 9134.

[2] (C) Tr. 16853.

[3] (C) Tr. 3156.

Again, asked by Mr. Wooden to explain why no rate service was provided for Districts 11 and 12, Reiter replied: "The Institute members in those districts never requested such service, and that is all I know about it."[4]

a. Non-Use of Land Grant Rate Service

For a period of about one year during 1936 The Cement Institute assembled and forwarded to members upon request land grant rate information for some of the territory in which such rates obtained. The land grant rates furnished consisted of Government quotations, railroad quotations or computations by shippers which had been filed with the Institute, and were transmitted to members without comment or notation other than the source from which the filer secured the information. In no case did the Institute calculate any land grant rate. On January 28, 1937 the land grant rate service of The Cement Institute was discontinued coincident with the expiration of the emergency freight surcharges, and it has never been reestablished.[5]

There is no evidence that any of the respondent companies in Northern California ever received or used any land grant rates furnished by the Cement Institute.

The record is devoid of evidence that any cement mill on the Pacific Coast ever forwarded any land grant information to The Cement Institute or ever requested any land grant rates from The Cement Institute. The evidence as to the extent of such information issued by The Cement Institute to any of the cement mills on the Pacific Coast consists of a notification, dated August 14, 1936, which was sent to several member companies in the southwestern area

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[4] (C) Tr. 16853.

[5] Com. Exs. 624 E; 841 A, J; 885-2 R.
Resp. Ex. 169.
Fdgs., Par. 8(n).

and to the four mills in Southern California, and reads as follows:

> "Land grant freight rates in cents per hundred pounds as shown below have been filed with this office. Such rates are stated to include Emergency Charges authorized by I.C.C. and are also the lowest on file in this office from the point of origin to destinations shown unless otherwise indicated.

Date Filed	From	To	Rate	Authority
6/14/36	Independence	Newkirk, New Mexico	31.587	Company Figur
"	Monolith	" "	42.874	" "
"	Victorville	" "	43.864	" "
"	Colton	" "	44.676	" "
"	Crestmore	" "	46.447	" "
"	Oro Grande	" "	43.774	" "
"	Merced	" "	43.500	" "

The abstract of bids opened September 4, 1936 for delivery at Newkirk, New Mexico, shows that none of the mills in Southern California submitted any bid and there is no evidence that any of said mills ever bid on cement for delivery at Newkirk, New Mexico.[7]

There is testimony of the responsible executives of individual member companies as to the source of the land grant information used by their companies, as follows:

Gay, General Manager of Santa Cruz, testified:

"*By Mr. Wooden*:

Q. Does your company file land-grant rates with the Cement Institution? A. No, we never did. We haven't any way of producing land-grant rates.

Q. Have you filed land-grant rates with the Pacific Coast Institute? A. No, sir.

Q. Have you received from the Pacific Coast Institute information as to land-grant rates? A. I

[6] Com. Ex. 841 R.

[7] Com. Exs. 170 A, 175 A.

don't recall ever seeing any data. We get ours directly from the railroad companies.

Q. Didn't you receive any land-grant information from the Chicago office of the Cement Institute? A. It seems to me that several years ago there was something came out.

Q. Well, since 1935? A. Well, even so—I think there was a letter came out.

Q. I mean the land-grant rates, themselves. Didn't you obtain land-grant rate information? A. We never got it from the Cement Institute; no, sir.

Q. I am referring to the land-grant rate applicable to certain federal projects. A. That is a letter that I refer to, but if we were looking for land-grant rates we would go to the railroad for them. We don't depend on any other sources than the railroad.

Q. You would have to know what the land-grant rate was from other mills as well as your own in order to—— A. We wouldn't only ask for the land-grant rates for our own mill; we would ask for land-grant rates from all competing mills so that we would be able to figure where we were going.'"[8]

CALIFORNIA: "The Company gets its freight rate information from the railroads. The Company did not send land grant freight rate information to The Cement Institute as suggested in the Institute circular sent out in December, 1935, or as suggested otherwise. The Company did not even use, or make any bid on the basis of, any land grant freight rate information received from The Cement Institute.'"[9]

Partridge, Sales Manager of Southwestern (Victorville) testified that his company did not get any land grant information or any service from The Cement Institute after it became a member of the Pacific Coast Institute.[10] There was no agreement whatsoever between Southwestern and

[8] (C) Tr. 8560-61; to the same effect, Tr. 8669.

[9] Blair, J. A., Chief Clerk, California, Tr. 42472.

[10] (C) Tr. 8952.

its competitors to use The Cement Institute land grant figures.[11]

Tongue, Secretary and General Manager of Superior Portland testified that his company has never forwarded land grant rate information to The Cement Institute and has not based any of its bids to governmental agencies upon land grant figures supplied by The Cement Institute.[12]

Oregon secures such land grant rate information as it desires from the railroads serving its territory; no one in the company ever conferred with any of its competitors with regard to land grant rates.[13]

3. Non-Use of Contract Reporting Service

The Cement Institute has never rendered a contract reporting service on the Pacific Coast.[1] Duque, Vice President of California, who was a trustee for District #11 testified that his company never furnished any information to the Cement Institute concerning specific job contracts or other contracts for future delivery of Portland cement.[2] Responsible executives of other member companies on the Pacific coast testified to the same effect.[3]

4. Non-Use of Statistical Service

None of the respondent companies on the Pacific Coast ever subscribed to or received, the statistical service of W. S. Mallory,[1] and there is no evidence that any of them

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[11] Blair, W. R., Sales Manager, Southwestern (R) Tr. 39086.

[12] (C) Tr. 8454-55; (R) Tr. 42917.

[13] Tr. 48102-03 adopting 42336.

[1] Reiter, former General Manager, Cement Institute (C) Tr. 16710-11.

[2] (R) Tr. 42447.

[3] Hollister, President, Northwestern Portland, Tr. 48116-17. Tongue, Secretary, Superior Portland, Tr. 42894-95.

[1] Com. Ex. 3008 A-C.

ever participated in, or used, the statistical service of the Cement Institute. The Mallory statistics "Clinker Production, Cement Production and Shipments for 1936, 1937 and 1938" show no information for any of the respondent companies on the Pacific Coast (Districts #11 and #12).[2]

[An undated tabulation "Percent of Shipments of Clinker Capacity" by Districts for the years 1925-1933, which was prepared by Mallory in connection with the unsuccessful efforts of the industry to arrive at a plan for sharing available business pursuant to Article VI of the NRA Code,][3] and a tabulation dated April 19, 1939 "Estimated Clinker Capacity" by Districts for the years 1936-1938, which Mallory prepared at the request of counsel for the Commission from a record of his own estimates on clinker capacity kept as a matter of personal interest to himself as a statistician,[4] are reported in Part XI, pp. 2001, 2008).

Gay, General Manager of Santa Cruz, testified that his company never announced the capacity of its plant to the Cement Institute.[5] [Mallory testified that Santa Cruz was one of the companies which was not satisfied with the capacity rating that he assigned to it in February 1934, that the cement companies did not furnish him with capacity figures, either actual or estimated, and that the only estimate he could give them was what they actually produced.][6]

Counsel for the Commission *conceded* that there is no evidence of arbitrary or artificial increase in capacity by any respondent company and no evidence of any agreement either to increase or to reduce capacity. Tr. 38689-90.

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[2] Com. Ex. 3203 A-H.

[3] Com. Ex. 2895 A-D.

[4] Com. Exs. 3204, 3205 A-E.

[5] (C) Tr. 8611.

[6] (C) Tr. 17292-94;
Com. Exs. 808-3 B, 3204.

Keller, who was Vice President in Charge of Sales of Pacific prior to December 31, 1934,[7] testified that when he was with Pacific it secured information as to statistics from all possible sources, one of which was the Bureau of Mines, and it had everything the Bureau sent out to give them the trend of business, that Pacific did not receive a statistical service from the Cement Institute at that time,[8] that the Cement Institute rendered no services to Pacific other than this:

> ["That under Article IX of the Cement Code we were required to file our prices and terms of sale with the Cement Code Authority and broadcast them to the trade, the dealers and the buying public, so everybody would be familiar with our price list."][9]

Duque, Vice President of California, testified that his company never furnished any information to the Cement Institute concerning production, or stocks on hand of clinker or Portland cement, or shipments of Portland cement and cloth sack returns, except that furnished for the purpose of fixing dues.[10]

5. Other Activities

TARIFF COMMITTEE: For the evidence introduced by the Commission relating to the activities of the Tariff Committee of The Cement Institute on the Pacific Coast, see Part XVII-B, p. 2808.

The Trial Examiner rejected evidence offered by respondents to show that the Tariff Committee had nothing to do with opposing imports of cement or with formulating trade policy and to show the specific activities that the

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[7] (C) Tr. 9132-33.

[8] (C) Tr. 9166, 9168.

[9] (C) Tr. 9134.

[10] (R) Tr. 42447.

Committee engaged in.[1] The Tariff Committee was officially terminated on December 9, 1935 and was inactive for some time prior thereto.[2]

PUBLIC RELATIONS COMMITTEE: The Commission has found that in District #11 no action was taken with respect to Public Relation Plan which was submitted by The Cement Institute during the Code Period.[3]

There is testimony by responsible executives of the individual member companies on the Pacific Coast expressly denying that The Cement Institute ever at any time had anything to do with the formulation or carrying out of their sales policies or practices or ever controlled or influenced or endeavored to control or influence their prices or method of conducting business.[4]

See also Part XVII-B, p. 2812.
See also Part XVII-C, pp. 2851, 2857.

K. Other Associations.

[The respondent companies as well as the non-respondent companies on the Pacific Coast were members of the Portland Cement Association as shown by the membership lists, as of June 30, 1932 and, excepting Beaver, as of July 1, 1937.[1] The following companies reported their membership in the Portland Cement Association as of June 1931, in response to the Commission's questionnaire: Santa Cruz,

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[1] (R) Tr. 23976-77.
[2] Com. Exs. 619 B, 624 D.
[3] Fdgs., Par. 21(d), (e).
[4] California: (R) Tr. 42447-48, 42478, 42709.
Riverside: (R) Tr. 42878.
Santa Cruz: (R) Tr. 42863-64.
Pacific: (R) Tr. 42838-39.
Calaveras: (R) Tr. 42853-54.
Yosemite: (R) Tr. 42846.
[1] Com. Exs. 3007 B-C, 3005-3006 (C) Tr. 8612 (Santa Cruz).

Pacific, Superior Portland, Northwestern Portland and Oregon.[2]

Gay, who has been general manager of Santa Cruz for over thirty years,[3] was questioned about meetings attended by him and representatives of other companies on the Pacific Coast, as follows:

> "*By Mr. Wooden*:
>
> Q. Have you had meetings, or have you attended meetings of other California manufacturers shipping into Oregon? A. Yes, I have.
>
> Q. To discuss questions of the marketing of cement in Oregon? A. No.
>
> Q. What has been the purpose of the meetings that you referred to? A. The meetings in Oregon would be in connection with the Portland Cement Association, promotion work.
>
> Q. You have had no meetings at which you discussed market conditions and prices? A. I don't recall any such meeting; no, sir. It would be against our policy."[4]

Keller, Secretary of the Pacific Coast Cement Institute, was examined by Commission's Counsel about the duties of the Portland Cement Association, as follows:

> "*By Mr. Paulson*:
>
> Q. Does it promote the sale of cement. A. It doesn't promote the sale of cement; it promotes the use of cement in competition with asphalt, lumber, brick, and other commodities. They are purely a promotional association."

Keller testified further, as to the scope of the work, and relation between his organization and the Portland Cement Association, as follows:

> "A. The scope of the work of the Pacific Coast Cement Institute and the Portland Cement Associa-

[2] Com. Exs. 3140 C, 3166 E, 3172 G, 3173 D, 3174 C.

[3] (R) Tr. 42859.

[4] (C) Tr. 8660-61.

tion is entirely different. They have no connection in any respect with one another.'"[5]

Respondents' witness, Elcock, who was a district manager of the Portland Cement Association from 1919 to 1925 testified that the activities of the Association have been confined to promoting the uses of Portland Cement, that it has had nothing to do with marketing of cement or sales or prices nor with prices and marketing policies of the member companies, and that there has been no discussion of prices at its meetings.[6] All of the testimony of responsible executives of member companies is that the Portland Cement Association is solely a promotional, educational and research organization.[7] Further direct evidence to the same effect by directors and officials of the Portland Cement Association, as well as executives of member companies, is reported in Part IX-B, page , *supra*. There is no evidence of any connection between the Portland Cement Association and either The Cement Institute or the Pacific Coast Cement Institute.

None of the respondent companies on the Pacific Coast was ever a member of the North American License Agreements or the Association of Licensed Cement Manufacturers, or the Cement Manufacturers Protective Association or the other associations or organizations mentioned in Fdgs. Pars. 5 and 8(b), except the Cement Institute. There is no evidence that any of the respondent companies on the Pacific Coast ever participated in any of [the asserted concert of action or other matters or activities referred to in Fdgs. Pars. 7(i), (j), (k), (l)]. The matters referred to therein antedate the existence of all except one or two of the companies on the Pacific Coast. The evidence relating to early trade associations activities is reported in Part II A, pp. 139-66, and Part IX, pp. 1779-94.]

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[5] (C) Tr. 9152-53.

[6] (R) Tr. 37469-70.

[7] See, for example, Beckett, President, Riverside (R) Tr. 42878.

PART XVII-B—THE WASHINGTON-OREGON TERRITORY

A. Producing Companies and Their Sales Areas.

1. Respondent Producers

Respondent Superior Portland was organized in 1925 with its offices in Seattle. It operates two cement plants, one situated at Concrete, Washington, which it owns, the other at Seattle, Washington, which it has operated since July 1, 1931 under lease from the Pacific Coast Cement Company. The plant at Concrete was originally owned by the Washington Portland Cement Company, a defunct company, and has been operated since 1908 by the original Superior Portland and its successor company. The plant at Seattle was built by the Pacific Coast Cement Company, which was organized in 1927 and began operations in November, 1929.[1] Superior Portland's entire sales are and have been confined to the State of Washington.[2]

Northwestern Portland began operating in May, 1928. Prior to that time the only mills in operation in western Washington were Superior Portland at Concrete and Olympic at Bellingham. Before Northwestern Portland established its mill at Grotto, Washington, which is eighty

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[1] Tongue, Secretary, Superior Portland (C) Tr. 8384-85; (R) Tr. 42893.
Resp. Exs. 2520, 3764-3765.
Com. Ex. 3174 A.
Fdgs., Par. 1 (3-0).

[2] In 1933 Superior Portland sold one carload of Quick-Strength cement f.o.b. Seattle which was subsequently shipped to Oregon. (By stipulation Quick-Strength cement, a special product, is not in issue—see Part I, p. 30.) In 1934 Superior Portland sold one carload of cement to a railroad f.o.b. Seattle, which was later shipped by the customer to Oregon. A small volume of Superior Portland's cement—about 2% of its total sales—which is sold and delivered on an f.o.b. Seattle basis, is subsequently shipped by the customers to Alaska. (Id., Tr. 3226-29, 8383, 8414, 8434, 8443-44, 8453-54, 8461 (R) 42892.)

miles northeast of Seattle, its executives surveyed the field with reference to its potentialities as a market for a new mill, and concluded that there was room for a third mill. Northwestern Portland is a small company, having a plant capacity of about 1,500 barrels daily and limited storage capacity.[3] It makes no sales or shipments outside the State of Washington and has not done so since 1929. It sells all of its output in central and western Washington within a comparatively small radius of its plant.[4]

Beaver was organized in 1913. It is a small company having one plant located at Gold Hill, Oregon, which began operating in 1917 and has an annual productive capacity of 350,000 barrels. Its normal sales area includes western, central and southern Oregon, some of the northern counties of California and southern Washington into which it ships small quantities of cement. The companies who usually sell cement in the markets served by Beaver are Oregon, Santa Cruz, Pacific, Monolith and Calaveras. Beaver also meets occasionally the competition of the *non-respondents* Cowell and Permanente.[5]

The Oregon Company was organized originally in 1915. It operates two cement plants, one at Oswego, Oregon, which began operating in 1916, and one at Lime, Oregon, which was built in 1923 by the Sun Portland Cement Company, a defunct company, and was acquired by Oregon in 1926. Oswego is about 8 miles south of Portland, Oregon.

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[3] Hollister, President, and Young, Sales Manager, Northwestern Portland (C) Tr. 8584 (R) 48114.
Resp. Exs. 2520, 3765; Fdgs., Par. 1 (2 W), 2.

[4] After making some sales in Oregon from June 1928 to the latter part of 1929, Northwestern Portland discontinued doing business in Oregon in 1929 because it lost money on every barrel of cement that it sold in Oregon. Id. Tr. 8595-96; (R) Tr. 48115.

[5] Carpenter, former President; Statter, President, Beaver (R) Tr. 47763-66.
Tongue, Secretary, Superior Portland (C) Tr. 8426-27; (R) 42893; Resp. Ex. 3765; Fdgs., Par. 1 (1).

These mills sell cement in practically the entire State of Oregon, southern and eastern Washington and southwestern Idaho.[6]

The Metaline Falls plant of Lehigh is a comparatively small plant, having a capacity of about 650,000 barrels annually. It was built in 1911 as the Inland Portland Cement Company by the President of Lehigh, who had lumber interests in the Northwest, and was operated as a separate company until about 1914, when it was taken over by Lehigh in order that it might be operated to a better effect as a part of the Lehigh organization. The Metaline Falls plant serves the portion of Washington east of the Cascade Range, and small portions of Oregon, western Montana, and northern Idaho. Lehigh maintains a sales office in Spokane.[7]

Spokane was organized under the laws of the State of Washington on February 5, 1937 and first became engaged in the production and sale of cement on May 5, 1937 when it purchased the property of the International Portland Cement Company Ltd. including its one cement plant at Irvin, Washington, which was built originally in 1913. International Portland Cement Company Ltd. was dissolved in November, 1937.[8]

None of the respondent companies in the Washington-Oregon territory is affiliated or connected with any other cement company and none of their officers or directors are

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[6] Knappenburger, Vice President, Oregon (C) Tr. 8466-67, 8584. Resp. Exs. 2520, 3765; Fdgs., Par. 1 (2 Z).

[7] Bowen, Vice President, Lehigh (R) Tr. 26550, 26557, 26565, 26580, 26592-93; Com. Ex. 967-5 W.
Resp. Ex. 3765; see also Fdgs., Par. 1 (2 L).

[8] Bell, Secretary-Treasurer, Spokane (R) Tr. 47655-57.
Resp. Exs. 3412-3416, 3418, 3765; see also Fdgs., Par. 1 (3 L).

officers or directors of any other cement company,[9] except that Lehigh is affiliated with Great Lakes,[10] a small company located in New York State.

2. Non-Respondent Producers

W. P. Cameron, called as a witness by the Commission, testified that he has been manager of the *non-respondent Olympic* Portland Cement Co. ever since 1913 when it started operations. The *Olympic* plant is located at Bellingham, Washington. Its sales territory consists of western and central Washington and Alaska. *Olympic's* largest market is Seattle and the surrounding territory. *Olympic* has a number of regular customers in Alaska who are sold f.o.b. Seattle. *Olympic* transports the cement from Bellingham to Seattle for such shipments.[1]

The *Pacific Coast Cement Company,* whose plant at Seattle, Washington, is now operated under lease by Superior Portland, and the *International Portland Cement Company, Ltd.,* whose plant at Irvin, Wash., is now owned and operated by the respondent Spokane, are not named in the complaint as respondents.[2]

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[9] Beaver (R) Tr. 47764.
Northwestern Portland (R) Tr. 48114.
Oregon (C) Tr. 8467.
Spokane (R) Tr. 47654.
Superior Portland (R) Tr. 42894.
Com. Ex. 3173 A.

[10] See Part I, p. 49.

[1] Cameron, Manager, Olympic Portland Cement Co. (C) Tr. 8522-26.
Resp. Ex. 3765.

[2] (C) Tr. 8436, 47654.

B. Pricing-Commercial.

1. Use of Delivered Prices

a. Reasons for Use

i. *Western Washington*

Tongue, Secretary and Sales Manager of Superior Portland (C), was examined on this subject, as follows:[1]

By Mr. Wooden:

"Q. As I understand it then, prior to 1928 your Concrete plant and the Olympic plant at Bellingham were the only mills operating in this district? A. Yes, sir.

Q. At that time or during this period did your mill do some business or make some sales on an f.o.b. mill basis? A. The date again, Mr. Wooden?

Q. At the time you and the Olympic were the only ones here? A. Yes, sir.

Q. What business was done on that basis? A. Practically all of our shipments.

Q. Whether commercial or to states, or states and cities? A. Yes, sir.

* * *

Q. As I understand it, you began the policy of selling on a delivered price basis after the entry of the Northwestern and Pacific Coast companies into the field? A. Yes, sir, we changed our practice at that time.

Q. What was there in the situation that caused you to change your practice at that time? A. We found prices, delivered prices, different from what they would have been had the customer purchased from our Concrete, and in order to meet the competition, we went to the delivered price system.

Q. Prior to that time, as I understand it, the purchaser bought f.o.b. Concrete and paid the freight from there? A. Yes, sir.

Q. That was true of commercial as well as public business? A. Yes, sir.

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[1] (C) Tr. 3222, 8386-87, 8389-90.

Q. Was the Olympia Portland Cement Company also selling on an f.o.b. mill basis? A. That was our understanding, yes, sir.

Q. You calculated your freight when you began selling delivered, of course, on a rail basis? A. Yes, sir."

And again[2]

By Mr. Leisure:

"Q. Mr. Tongue, Mr. Wooden also brought out that there came a time when you changed from an f.o.b. mill price to a destination price. Do you recall that? A. Yes, sir.

Q. Will you tell us the circumstances under which that was done? A. After the Northwestern came into the picture in 1928 with a different line of freight rates from Grotto, other than was in effect at Concrete, we found different prices, in other words, the customers were being quoted f.o.b. destination rather than at the mill plus freight. To simplify our accounting and to meet these prices, as we found them, we adopted the policy of quoting f.o.b. destination. We have followed that practice since.

Q. Did your trade have anything to do with that policy? A. Many of our dealers, in fact most of them, are interested in the price not at the mill, but at their railroad station where they do business.

Q. Do you use the Institute freight rate book? A. No, sir."

And again:[3]

By Mr. Little:

"Q. Mr. Leisure asked you if there had been any considerable demand from dealers for quoting prices f.o.b. mill or making deliveries f.o.b. mill, and you said no, there had not been hardly any. Has there been any protest from your dealers or any dealers

[2] (C) Tr. 8438-39.

[3] (C) Tr. 8444.

with reference to your practices? A. No, sir, our dealers prefer the rail shipments.

Q. And what is the preference, if any, as to quotation of prices on a destination basis? A. Dealers and contractors alike ask for delivered prices."

ii. *Eastern Washington*[1]

Fellows, testified that prior to 1912 he was purchasing agent for the Washington Brick, Lime & Sewer Pipe Company which operated a retail building material business in Spokane Washington, at the same time that it manufactured sewer pipe, terra cotta, common and face brick, with four different plants, and cement was one of the products which it sold.[2] Fellows' testimony on this subject is as follows:

"Q. During that period of time, Mr. Fellows, from what cement mills did you get your quotations to purchase cement? A. At that time we were buying cement from the Golden State Portland Cement Company, I think was the name. It was down in California, and from either Three Forks or Trident Portland Cement Company. The Three Forks Cement Company, I think it was, and Metaline.

Q. How, if you recall, were your prices quoted to you then? I mean, as purchasing agent for this building supply company, did you receive quotations from these cement manufacturers f.o.b. mill or f.o.b. destination, if you recall? A. No, f.o.b. destination. That is the way we wanted it.

Q. Now, you added 'that is the way we wanted it.' What do you mean by that? A. We wanted to know what it was going to cost us at Spokane. We didn't have any particular traffic department of our own, and if we bought it from Trident, Montana, or down in California, there is considerable freight involved there, considerable distances, so we wanted to know

[1] The territory east of the summit of the Cascade Mountains (C) Tr. 8415.

[2] (R) Tr. 25485.

what it was going to cost us at Spokane." (Tr. 25491-92)

b. Source of Price Information[1]

Tongue, Secretary and Sales Manager of Superior Portland, was examined as to how he obtained information on competitor's prices, thus:[2]

"*By Mr. Wooden*:

Q. In what way do you ascertain what are the delivered prices of your competitors? A. There are several ways, Mr. Wooden. One is through dealer contacts. We have many dealers who handle cement other than ours. And from public bid openings * * * And our salesmen going out to the trade and picking up the prices. * * * And contractors advise us of prices.

* * *

Q. How did you find out about the other company making this increase in price? A. Our dealer telephoned to us or advised our salesman of the increase.

Q. Is that the only way you found out abont it? A. Yes, sir."

Northwestern Portland replied to the Commission's inquiry as to how it determined competitor's prices, thus:[3]

"We ascertain through contact with consumers and dealers going prices and quote accordingly."

Oregon's testimony[4] is that information on competitors' prices is picked up in the field by its salesmen in the regular course of their calls and transmitted immediately to the home office; friendly dealers and contractors usually

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[1] See also Fdgs., Par. 9(e) and Part II C, *supra*, pp. 220, 230.

[2] (C) Tr. 8397, 8449.

[3] Com. Ex. 3172 E-F.

[4] (R) Tr. 48102-03 (adopting 38742-44).

telephone Oregon promptly regarding any price changes learned of; tabulations of bids from lettings attended by its salesmen are also a source of information as to competitors' prices.

Fellows, testified[5] that when he started out on the road as a salesman for the International Portland Cement Company, Ltd., in 1912 the dealer at the first place he stopped told him that his price was 10¢ too high; that he telephoned his sales manager and told him what he had found and the sales manager said he had received the same reports from other salesmen.

i. *Non-Use of Price Lists*

The witness, Tongue of Superior Portland, testified:[1]

"*By Mr. Wooden:*

Q. You obtain price lists of your competitors, do you not? A. None of our competitors in this territory issue printed lists, Mr. Wooden.

Q. Are you the only one who does? A. We do not.

Q. What form is it in? A. We have a typewritten list for our own use.

• • •

Q. These price lists which Mr. Wooden asked you about, and you said they were typewritten, as I recall? A. Yes, sir.

Q. Did you give them to the dealers at all? A. No, sir.

Q. And did you give them to competitors? A. No, sir.

Q. They were for your own use? A. That is right.

Q. For your own sales? A. And for our accounting department."

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[5] (R) Tr. 25489-90.

[1] (C) Tr. 8397, 8435-36.

Tongue was examined further, with reference to information occasionally provided by competitors as to individual prices, as follows:[2]

"*By Mr. Wooden*:

Q. Do you sometimes ask them what their prices are at certain towns? A. Yes, sir.

Q. And do you tell them only in cases you do not know whether your prices at that town is the same as theirs? A. No, sir.

Q. What are the cases in which you do ask for it? A. A contractor living in Seattle, a good customer of ours, may ask us to get a price on cement in California, Wyoming or some place where we don't ship to and we will find out for him as an accommodation to him, what the price is there."

Knappenburger, Vice President, of Oregon (C) testified that: during the Code period Oregon received price lists from some companies that came up into its territory, namely, Santa Cruz, Portland Cement of Utah, Cowell, Calaveras, Pacific, and Riverside, but not since the Code; during the Code period Oregon exchanged its price list with the companies named but never exchanged its lists with any of the mills to the north.[3]

c. Meeting Competition

Answers to the Commission's Questionnaire of June 1931:

Superior Portland:

"On January 1, 1929 our price to dealers and commercial trade was f.o.b. cars our mill at Concrete, Wash. * * * about January 1, 1929 a new cement mill came into production in Seattle, our

[2] (C) Tr. 8452.

[3] (C) Tr. 8473-74.

largest consuming center, and we at that time gave up all mill base practice and sold our cement since that time on a delivered price basis, meeting competition wherever we found it." (Com. Ex. 3174 C)

Northwestern Portland:

"Grotto, Wash., was basing point for points in vicinity of plant. Other points prevailing sale price at destination is used • • •

Low prices have prevailed for cement during 1930 and 1931. So far as we can see there has been no basing point for prices and we have accepted business at going prices at points of delivery • • •

We have no base price at our mill" (Jan. 26, 1932) (Com. Ex. 3172 E-F, H).

Lehigh:

"• • • The delivered price of Lehigh Cement is derived or calculated from a maximum mill net at each plant. The maximum mill net is that remainder which the Lehigh Company believes it should properly receive for its product after all freight, package charges, and discounts have been deducted.

In arriving at a delivered price per barrel the Company adds to its maximum mill net the published freight rate per barrel for rail or water delivery to destination. In the event that lower competitive prices are openly quoted at the delivery point for which a Lehigh quotation is to be made, the Company thereupon decides whether or not it will reduce its maximum mill net on deliveries to that particular destination. If the Company elects to make a lower price, the Company thereupon issues a quotation for its product at a lower delivered price per barrel.

• • •

In computing delivered prices the Lehigh Company considers not only the cost of manufacture at its own plants, but, because of the very active competition in the industry, the prices at which the Lehigh Company has reason to believe its competitors are willing to sell at points of delivery within reach of Lehigh plants." (Com. Ex. 3143 I, M)

Oregon:

"These prices are arrived at by adding to our base prices the freight to point of delivery."

"Basing Points: Oswego, Ore., Portland, Ore., Lime, Ore. When cement is shipped from Oswego and Lime into market based on Portland price, freight is absorbed by ourselves to meet competition based on Portland price." (Com. Ex. 3137 D)

Testimony:

Tongue, Secretary, Sales Manager of Superior Portland:[1]

"*By Mr. Wooden*:

Q. How do you arrive at the figure that you set as your maximum mill net? A. How do we arrive at it?

Q. Yes. A. We take into consideration competitive factors, including other competitive materials, such as asphalt pavement, brick, etc., and set a price which we think will not be out of reason and will permit the buyer to purchase and use cement."

Hollister, President of Northwestern Portland:[2]

"*By Mr. Wooden*:

Q. When you started your mill at Grotto, as I understand it, you adopted the maximum net prices in effect at the other mills? A. At Bellingham and Concrete, yes, sir."

Bowen, Vice President of Lehigh:[3]

"Q. You said this morning, if I am not mistaken, that the Metaline Falls was a base mill; is that right? A. Yes, it is.

Q. And how long has it been a base mill? A. Well, Metaline Falls, as we have discovered from

[1] (C) Tr. 8423.

[2] (C) Tr. 8588.

[3] (R) Tr. 26682-83.

hindsight, while it is an extremely good location for the manufacture of cement is an extremely poor location market-wise. For a good many years we operated at Metaline Falls as a non-base mill, but in 1932 decided we wanted to make it a base mill, in order that we might be able to quote prices in at least part of eastern Washington that would make it as tough as we could for our competitors to reach even those markets.

Hence, we established it as a base and have continued it as one ever since."

Fellows, former salesman of International:

Fellows who was with the International P. C. Co. Ltd., when it started in the cement business in Spokane, Washington, in January, 1912, testified that the practice followed by International at that time was to meet the lowest prices it found quoted in the field. International used its own base plus freight as long as it was the lowest price, but if it found a lower price it would meet it. When International first started doing business it determined as nearly as it could what base was being used at Metaline Falls because that was the nearest plant. Subsequently its plant at Irvin became a base.[4]

Cameron, Manager of Olympic:[5]

"Q. Do you calculate your competitors' maximum mill nets by figuring back from delivered prices? A. Yes, sir.

Q. After finding that these figures, back from several points, reach the same figure, do you then

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[4] (R) Tr. 25485, 25489, 25491, 25820-21; Resp. Ex. 2610 B.

[Two letters dated January 25, 1915 and January 28, 1915, from the General Sales Manager of Colorado to the Sales Manager of Three Forks, an affiliated company, relating in part to the use of Irvin as a basing point (Com. Exs. 3209 A-B, 3210 A-C), are reported in Fdgs., Par. 7(L) and Part II C, *supra*, pp. 245-248.]

[5] (C) Tr. 8530-31.

conclude that that shows the maximum mill nets? A. Yes, sir.

Q. Do you then quote at other points on the basis of that calculation? A. Well, I wouldn't say that we do that. If it becomes a general maximum mill net, we will."

i. *Price Changes*

As shown by the answers of the respective companies to the Clark-Burns questionnaire, the base prices of individual mills in Washington-Oregon territory are affected by a change in the base price at a neighboring basing point, as follows:

Mill	Answer	Com. Ex.
Superior Portland	"Any change in the base price at a neighboring basing point would immediately cause us to consider meeting it or lose our market territory affected. We cannot get any more for our cement from Buyer than he can buy from our competitors.	967-1 N, 1-o, 2 D, 2 E
Oregon	Does not affect it unless it is necessary to reduce it to meet competition in territory customarily served.	967-3 J, 4 V, 4 W
Spokane	We would have to follow the new base or lose the business on a reduction, and if an increase, competitor could not maintain the increase as purchasers of cement will not ordinarily pay one mill any more than the other.	967-2 T

Mill	Answer	Com. Ex.
Lehigh (Metaline Falls)	It is difficult to answer in general terms the question as to the effect on our base price of a change in a neighboring base price, as each such instance presents a separate problem. If a neighboring base price advances we consider such questions as: Does the change reflect a general increase in cost of manufacture? Is the present and prospective demand such that the advance is likely to be maintained, or is it likely to prove abortive? Is our competitive position best served by advancing our base or by holding it unchanged? If we do not change, will the relationship between the several base prices be practical? If the change in the neighboring case appears sound do the same conditions apply equally at our base? Questions of like nature arise in the case of a reduction at a neighboring base point."	967-6 G

In general, no one producer in the Washington-Oregon territory is a "price leader." Oregon states that its Oswego mill is a "price leader." Price changes have been initiated from time to time by several different companies.[1]

[1] Com. Ex. 967-1 P, 2 F: Superior Portland answers to Clark-Burns questionnaire.
Tongue, Secretary, Superior Portland (R) Tr. 42908.
Com. Ex. 967-3 L, 4 X: Oregon answers to Clark-Burns questionnaire.
Com. Ex. 967-2 U: Spokane answers to Clark-Burns questionnaire.
Com. Ex. 967-6 H: Lehigh (Metaline Falls) answers to Clark-Burns questionnaire.

The Commission has found that "* * * When a corporate respondent makes a change in its base price, written delivered price quotations reflecting this change are usually sent to all customers * * * Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made."[2]

There is no evidence of any exchange at any time, direct or indirect, of basing point prices or changes in such prices among any of the respondent companies in the Washington-Oregon territory.[3]

In evidence is a recent Lehigh list of base prices which includes in part, the base prices reflected by current delivered price quotations in the Washington-Oregon territory.[4] Bowen, Vice President of Lehigh testified that this list was not received from or distributed to competitors. Lehigh received the information regarding the prices applicable to Seattle, Wash., Portland, Oregon, and Lime, Oregon, from B. H. Rader, its Western Sales Manager in Chicago who, in turn got it from Lehigh's district Sales Manager in Spokane; this and similar lists were compiled by Lehigh independently in the ordinary course of business from the most recent information picked up in the field which reflected these base figures. A similar list (Com. Ex. 2777 A-C), prepared by Bowen's assistant and submitted by request to the Commission June 28, 1934, includes the base prices found to be effective currently in Washington-Oregon territory.[5]

Letter from G. Tongue of Superior Portland to W. P. Cameron of Olympic, dated August 23, 1929 reads:

"Attached sheet is from 'Rock Products' of June 22nd, which shows your Bellingham base as $2.10

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[2] Fdgs., Par. 9(e).
See also Part II C, pp. 230-34, *supra*.

[3] Cf. Fdgs., Par. 9(e).

[4] Resp. Ex. 1109 D.

[5] (R) Tr. 26655, 27206-07.

to contractors net, without bags, and our concrete base $2.35. We are including in our figure the discount.

Do you think you should adjust your figure or should we adjust ours?" (Com. Ex. 1209-2 L)

Cameron testified about this that "*Olympic* has provided trade publications with information as to its maximum mill net prices only to a limited extent; the Rock publications is the only one and it has not asked for such information in the last three years. *Olympic* has not provided information as to its maximum mill net to any of its competitors."[6]

Oregon denied that it ever received lists of base prices from any competitor or that it notified competitors of changes in its prices.[7]

d. Absence of Agreement

There is testimony of responsible officials of the respondent companies in Washington-Oregon territory by which they each specifically denied that they ever at any time entered into any agreement, understanding or commitment with any other company to use or employ any basing point or any particular system or method of pricing or marketing or to calculate prices according thereto.[1]

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[6] (C) Tr. 8530.

[7] (R) Tr. 48102-03 (adopting Tr. 38703).

[1] Tongue, Secretary, Superior Portland (R) Tr. 42898, 42917.
Hollister, President, and Young, Sales Manager, Northwestern (R) Tr. 48118-20.
Carpenter, Statter, President, Beaver (R) Tr. 47765.
Bell, Secretary, Spokane (R) Tr. 47657.
Bowen, Vice President, Lehigh (R) Tr. 26617; 26657, 27007-08, 27162, 27173.
Oregon, Tr. 48102 (adopting Tr. 37605-06, 26136).
(Moore, N. D., former President and Director of Pacific Coast Cement Corp., deceased in June 1940. Resp. Ex. 3753 B).

The Manager of the *non-respondent* Olympic appeared as a Commission witness and testified specifically that he never took up with his competitors any proposal as to what should be done and had no arrangement with competitors or with anyone.[2]

2. Non-Use of Freight Rate Books

The evidence is that none of the mills in Washington-Oregon territory ever received or used the Institute freight rate service. The Institute freight rate service has never covered any of the territory in which Washington-Oregon Companies market cement.[1]

A meeting was held in the offices of Northwestern Portland in Seattle, November 8, 1929, of traffic men representing the interested carriers and representatives of *Olympic*, Superior Portland, Northwestern Portland and the Pacific Coast Cement Company concerning rates proposed by the carriers from the mills in western Washington to various branch line points west of the Cascade Mountains.[2] Hollister, President of Northwestern Portland was questioned by Mr. Wooden about this, thus:

> "Q. What was the substance of the situation that you were seeking to adjust there? A. It is one of those cases that come up occasionally when cement companies made application to a carrier for a new rate, and the carrier out of courtesy to all the manufacturers, assembled and talked this matter over. In this field, these carriers have what they call a Docket, and the cement companies are notified in advance what is coming up on the Docket when some mill is making application for a reduction. And the carriers do not want to put in a rate and then have

[2] (C) Tr. 8535, 8541.

[1] Fdgs., Par. 8(c); Com. Ex. 595 E; (C) Tr. 3154-56, 8439, 8444-45, 16710-11, 16852-53; (R) Tr. 42895, 47657, 48116.

[2] Com. Ex. 1199 A-D: Memo of meeting.

a mill come forward after tariffs have been published and object to the rate; that is all. (Tr. 8598)

Q. What were you and the other cement companies seeking to accomplish by this proposed adjustment of rates between the mills and several points as covered by Exhibits 1199 A to D inclusive?

A. That is a practice that has been in effect for years. * * * As far as our Company is concerned, it was to be on a parity with other producers, that they had no advantage over us on freight rates; that is all." (Tr. 8601)

Tongue, Secretary and Sales Manager of Superior Portland, who attended the meeting referred to above, testified that it was attended by representatives of four cement companies and a freight rate expert, but this was merely for the purpose of studying proposed changes in freight rates which would have affected all of the cement companies involved; that neither prices of cement nor the adoption of uniform rates were discussed at this meeting.[3]

W. P. Cameron, Manager of *Olympic* testified that the freight rates from Bellingham, Concrete and Grotto are the same to Seattle and points south, including Tacoma and Olympia. The rates from these mills to Vancouver have always been the same since the beginning of the Olympic mill. The rate to Yakima is the same from all three mills; there are some destinations in western Washington where the freight from the various mills varies; Everett is about the only one of any importance.[4]

There is testimony of responsible officials of the mills in the Washington-Oregon territory by which each specifically denied that his company ever entered any agreement with any other cement company having to do with freight

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[3] (R) Tr. 42898-99.

[4] (C) Tr. 8531-32.

rates, or distribution of information with reference to freight rates.[5]

3. "Arbitrary" Prices

a. Vancouver, Wash.

A letter dated June 18, 1931 from Beaver to a dealer at Albany, Oregon, referring to the low price of cement at Vancouver, Washington, states:

> "With this price in effect at Vancouver, it will no longer be profitable for the boot-legging into this State of cement obtainable there at lower prices. Of course, it is probably that the dealers who have been bringing in Washington cement will have accumulated some stock of it in their warehouses so that the effect of the change may not be immediately perceptible.
>
> This is for your information as we presume you will be interested in learning that the annoyance you have been having at Albany from this source will probably be terminated at an early date." (Com. Ex. 1207 C)

Hollister, President of Northwestern Portland, testified that prices are so low in Vancouver and along the Columbia River that he would call it a distress territory; Northwestern Portland has not sold in Vancouver since sometimes in 1929, '30 or '31 (Tr. 8596-97).

G. Tongue, Secretary and Sales Manager of Superior Portland testified that: Superior Portland has an arbitrary price of $2.40 at Vancouver, Washington which has been in effect for about ten years; this price is $2.40 gross,

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[5] Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48116, 48119.
Tongue, Secretary, Superior Portland (R) Tr. 42898.
Bowen, Vice President, Lehigh (R) Tr. 27161.
Oregon (R) Tr. 48102 (adopting Tr. 37316).

in cloth, which is approximately 85¢ below what the price would ordinarily be, if calculated in the usual way; it is a price established by Superior Portland which it thinks will meet competition in that territory; the competition which causes this arbitrary price is from the Oregon and California mills which sell into Vancouver; the Oregon mills have been selling there since they started in business; the California mills have been selling there longer than 25 years (Tr. 8425-27). Gay, General Manager of Santa Cruz testified that in the State of Washington Santa Cruz follows the prices that have been established by other mills (Tr. 8655). Tongue was examined as to competitive conditions in the Vancouver, Washington market, thus:

> "*By Mr. Wooden:*
>
> Q. You mean that there is more than one price at a given time in Vancouver by different mills? A. We have one price. Our competitors have prices, in the same price area.
>
> Q. I know, but are they the same as yours, or different? A. They are different, sir.
>
> Q. In Vancouver? A. Yes, sir.
>
> Q. Are they higher or lower? A. They may be both.
>
> Q. How do you account for that condition there? Isn't that quite different from the conditions at the usual destinations? A. There has always been a continual strife in that particular area.
>
> Q. With no identity of price at any given time between different dealers? A. That is true for a large part of the time; yes, sir." (Tr. 8427-28)

b. Astoria, Oregon

Letter dated April 21, 1931 from Beaver to a dealer at Astoria, Oregon reads, in part:

> "Bearing in mind that the freight rate from our plant is the same to both Astoria and Bradwood, we readily see that it seems inconsistent to maintain a higher price at the latter than at the former

point. If there were any practical way of ironing out the seeming inconsistency we would be glad to do so but the situation is this. Prices from Portland east and west are based on Portland plus freight to destination point which would make a price at Astoria of $3.26 per barrel and this coincides with the prices at intermediate points closer to Portland. The price of $3.05 which is actually charged at Astoria is an arbitrary price established at that point by the California companies and met by us. On the face of the matter it would seem reasonable to establish a like price at the intermediate points bearing the same freight rate, but that would not solve the difficulty, it would merely shift it. Our establishment of a $3.05 price at Bradwood and other similar points would force the California cement companies to meet the same price at those points and when they did so their Astoria representatives would reverse the reasoning which would expect a $3.05 price at other points because that is the price at Astoria. Their reasoning would then be that having a price at Bradwood of $3.05, and the cost of delivery to Astoria being less by the amount of the freight from Astoria to Bradwood, they should receive the benefit of a price at Astoria sufficiently lower than the Bradwood price to reflect the difference in the cost of delivery to the two points. We would in turn then be obliged to meet the new Astoria price or retire from the Astoria territory. In the one case the same differential now existing between Astoria and Bradwood would be reestablished at a lower price level. In the other case the California companies would have undisputed control of the Astoria market. In either case your competitive situation would be worse than at present." (Com. Ex. 1207 G-H)

c. Seattle and Tacoma, Wash.

Superior Portland has at all times made effective the same price to dealers and other purchasers located within the metropolitan areas of the Cities of Seattle and Tacoma. Prior to 1929, when Superior Portland was selling f.o.b.

Concrete only, this was accomplished by allowing a deduction from the invoice of the differential in freight. For example, a customer located on the Great Northern in Seattle had one freight rate from Concrete, a customer located on the Northern Pacific had a higher freight rate. Superior Portland's invoices showed an equalization of the two rates so as to place the customers on the same competitive basis. After Superior Portland started the practice of selling f.o.b. destination its invoices showed the actual amount of freight deduction to be made by the purchaser. This amount varied according to the routing given the car from Concrete to Seattle or Tacoma. The effect of this practice was to place all purchasers within the metropolitan areas of these two cities on a competitive basis as far as Superior Portland's prices were concerned.[1] The Seattle market is the largest point of consumption for cement in Western Washington. It represents approximately one-third of the available business in Western Washington. The Tacoma area is the second largest consuming market in Western Washington.[2]

C. Limits of Marketing Areas.

Freight rates and the resulting mill nets are factors which are considered by the individual mill in Washington-Oregon territory in deciding where it will actively solicit business.[1]

Tongue, of Superior Portland testified that mill net is simply the amount Superior Portland hopes to receive; it doesn't quote its mill net to a customer.[2]

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[1] (R) Tr. 42918.

[2] (C) Tr. 8388, 8414; Com. Ex. 967-1 G, 1 W.

[1] Com. Ex. 967-1 D, 1 T: Superior Portland; Com. Ex. 967-2 Z, 3 Y: Oregon; Com. Ex. 967-2 J: Spokane.

[2] (C) Tr. 8487.
Cf. Fdgs., Par. 24(c).

Superior Portland receives its maximum mill net only in the territory immediately adjacent to its mill at Concrete. Very little cement is consumed there.[3] Superior Portland sometimes sells at a loss in order to keep its brands known and to keep the good will of the dealers or contractors at the destination.[4] It sometimes seeks large sales outside its usual market territory which require greater freight absorption, such as the Grand Coulee Dam project, where it bid on two million barrels of cement. Its mill net on the Grand Coulee Dam project was the lowest it has received in some time.[5] Construction of the two plants at Grotto and Seattle, Washington created more competition for Superior Portland and resulted in reduction of its mill nets in a larger territory. Conversion of the Seattle mill from a non-basing mill to a basing mill further reduced its mill nets. Shipments of Superior Portland yielding mill nets less than its base price are largely concentrated in the city of Seattle, which is the largest market in its sales territory, having about one-third of the population of the total area served by its mills.[6] Superior Portland would have to absorb more freight if it sold in Oregon than it has absorbed at any point in Washington.[7]

Oregon's shipments from the Oswego plant yielding mill nets less than its base price are largely concentrated in the City of Portland, Oregon.[8] The marketing territory of Oregon's mill at Lime has been reduced due to the construction of a competing plant at Inkom, Idaho and its establishment as a basing point. The Lime mill was com-

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[3] Id., Tr. 8387, 8416.

[4] Id., Tr. 8437.

[5] (C) Tr. 8439, 8448; Com. Ex. 967-1 D, 1 E.

[6] Com. Ex. 967-1 F, 1 G, 1 V, 1 W.

[7] (C) Tr. 8430.

[8] Com. Ex. 967-3 A, 3 C.

pelled to withdraw solicitation adjacent to the new basing point. Its shipments yielding mill nets below its base price are negligible.[9]

Spokane's market territory was restricted by the establishment of mills at Grotto and Seattle, Washington, since it could no longer meet competition at some points without taking a severe loss on such business. Spokane no longer actively solicits business in the territory formerly served by it, adjacent to these new mills. Its territory has shrunken considerably due to charges in base prices and resulting mill nets which have made the business unattractive.[10]

Lehigh's answer to the Commission's Questionnaire describes the variations in its market territory and mill nets, and the reasons therefor, as follows:[11]

> "The area within reach of any one of the Lehigh plants is not constant. One week a plant may be able to ship profitably to a farther point than it can the next. Hence, this area varies in proportion to the rise and fall of prices. There is therefore no fixed area from which a plant can receive a constant mill net.
>
> Furthermore when the freight charge, rail or water, is deducted from the f.o.b. price at one point of delivery, it may, and frequently does, give a net to the plant which is higher or lower than the mill net which results on the same day by deducting the freight charge, rail or water, from the price at another point of delivery. In other words, the net to the plant on a given day or during a given week, month, or year, can be arrived at only by averaging the differing mill nets on the day or during the week, month, or year in question."

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[9] Com. Ex. 967-3 Y, 3 Z.

[10] Com. Ex. 967-2 K.

[11] Com. Ex. 3143 M.
Cf. Fdgs., Par. 24(b) (c).

The usual reasons for shipments yielding the lowest mill nets are "competition with other cement mills", and "sales to the Federal Government"[12]. Superior Portland realizes mill nets below its base price on the "major portion of all of its federal government business". Spokane realizes mill nets below its base price on the "better portion of its federal government business".[13]

The net mill value of the shipments of mills in Washington-Oregon territory for a part, or all, of the years 1929, 1930 and 1931 is set forth in the Answers[14] to the Commission's Questionnaire of 1931. Evidence offered on behalf of respondents as to the reasonableness and fairness of cement prices, and costs, profits and losses, was rejected by the Trial Examiner.[15]

D. Identity of Published Prices.

H. G. Phillips, Chief Clerk of Galbraith & Co., building material dealers of Seattle, Washington, testified that his firm buys standard Portland cement from both Superior Portland and *Olympic* and pays these two companies the same price (Tr. 8378-80).

Officials of Superior Portland,[1] Northwestern Portland[2] and *Olympic*,[3] examined on this subject by Commission's

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[12] Com. Ex. 967-1 H (Superior Portland), 3 D, 4 B (Oregon), 2 N (Spokane).

[13] Com. Ex. 967-1 E, 1 U, 2 K.

[14] Com. Exs. 3174 B (Concrete), 3163 C (Seattle), 3172 (Grotto), 3173 (Oregon), 3143 K, O (Metaline Falls).

[15] (R) Tr. 26394, 32062, 32329-30, 36424, 36759, 47462-64, 47470-99, 47504, 47518-23.

[1] Tongue, Secretary, Superior Portland (C) Tr. 8395-96, 8417.

[2] Hollister, President, Northwestern Portland (C) Tr. 8588.

[3] Cameron, Manager, Olympic (C) Tr. 8528, 8532, 8576-77.

counsel, testified that they found the prices of competing mills ordinarily the same at the same time and place and under similar conditions.

The testimony of responsible officials of Beaver is that:

> "such prices have not been set by reason of any agreement, express or implied, but have been entirely due to inability to establish, maintain, or secure a higher price than those currently quoted by competitors, coupled with unwillingness to accept any lower figure in any given instance; hence, whenever Beaver Portland has been able to learn competitive prices from price lists or from reports of its salesmen its quoted prices have been identical with those of its competitors." (Tr. 47765)

Fellows, who operated a retail building material business in Spokane prior to 1912, testified on this point thus:

> "Q. Well, now, do you remember, Mr. Fellows, as to these prices whether or not they were quoted to you by these different companies when they were quoted to you by these different companies—do you recall whether or not they were identical or did they vary among the three companies? A. Well, they eventually became identical at some time or another. One company might change their price, a lower price or a higher price, but eventually the other companies would meet whatever prices we had." (Tr. 25493)

As to the necessity of meeting the lowest prices of competitors, the witness Tongue, Secretary and Sales Manager of Superior Portland, testified thus:

> "*By Mr. Wooden*:
>
> Q. Was there a recent increase in price in Yakima by any company? A. There was an attempted increase.
>
> Q. And did you meet that increase? A. No, sir, we did not.

Q. Then what happened? A. The other company withdrew its price.

* * *

Q. Was this price you failed to follow in Yakima, was that effective a certain number of days ahead of the announcement or after the announcement? A. As I recall, what the dealer told me, it was effective immediately.

Q. It had to be withdrawn because you would not follow along? A. Yes, sir." (Tr. 8449-50)

Northwestern Portland replied to the Commission's inquiry of May 27, 1931 on this subject as follows:

"Cement being a standard product, all of which must meet standard specifications, we have been unable to sell cement at a price higher than lowest quoted prices; therefore we ascertain through contact with consumers and dealers going prices and quote accordingly." (Com. Ex. 3172 E-F)

Cameron, Manager of the *non-respondent*, Olympic, who was asked how long a time his customers would continue buying his cement at a higher price than they could purchase from a competitor, testified:

"They wouldn't continue for any length of time as soon as they found out." (Tr. 8550)

1. Sales Below Published Quotations

G. Tongue, Secretary and Sales Manager of Superior Portland, testified that during all the 27 years that he has been connected with Superior Portland and its predecessor company, a considerable volume of their cement sales has been made at secret prices below its regularly quoted prices, that to his knowledge this practice of quoting secret prices has been followed by his company as well as most, if not all, of their competitors and it has not been confined to any particular period of time but has continued

throughout the entire period of his association with Superior Portland with the exception of the Code period, and the same practice of secret price cuts continues to be the practice followed by his company and their competitors. The witness set forth in detail 29 specific instances where Superior Portland quoted secret price cuts in order to obtain business which otherwise would probably have been taken by its competitors, illustrating its practice during a period of 6 years prior to the date of the Complaint. Tongue testified further, that there have been many instances where Superior Portland lost substantial orders to competitors because it later found from either dealers, contractors or other sources that lower secret prices were quoted on such business by its competitors.[1]

2. Price War

A letter dated April 23, 1931 from Beaver to a dealer at Astoria, Oregon reads:[1]

> "The cement market has been unsettled, probably more so here at Portland and adjoining points than at Astoria. The trouble lies, primarily, with the chaotic condition in Washington. The companies there have been warring amongst themselves for some time. Probably they are near the exhaustion point. We think that in the comparatively near future the Washington companies will be able to stabilize their market after which the problem here will be simplified. While the Washington companies have not been shipping into Oregon, there has been some bootlegging by truck in and around Portland due to the low prices available across the line. Of course, the psychological effect on this market has been extremely bad for the existing situation is bound to create uneasiness amongst the contrac-

[1] (R) Tr. 42919-25.

[1] Com. Ex. 1207 E-F.

tors here who are paying higher prices for their cement.

While, for the reason stated above, there has been considerable unsettlement in this market and undoubtedly more or less deviation from the established prices of cement, we feel that conditions could and would have been decidedly worse had we undertaken to meet the cut prices that have been made. The effect would very probably have been to bring about a fight in this state which conceivably might have been very much worse than in Washington. We were very much worse advisedly for the reason that the severity of the fight in the Northern State must have been somewhat ameliorated by their large volume of cement sales in 1930. Some 500,000 bbls. more were sold in 1930 than in 1929. On the contrary, exclusive of the Owyhee dam project which is not available to the plants of the western part of the state, the cement consumption in Oregon in 1930 was approximately 100,000 bbls., less than in 1929 and in the state of California in 1930 consumption fell off 2,000,000 bbls. from the 1929 figure.

It is unfortunate that cut prices could not always have been met but at present it seems better judgment not to do so. It is true that failure to meet cuts will lose more or less business but while meeting them might take the particular job, it might possibly induce an orgy of cutting that would reduce the price to a point where it would be necessary for all the cement companies to eliminate the dealer's allowance entirely and sell direct.

* * * The long continued depression that we have been going through has certainly been trying to all of us and it would seem as though we must have nearly reached the bottom. It is hard to realize the severity of what we have gone through because it has been more gradual than has been generally believed. For instance, a check of the building permits issued in the City of Portland shows a steady percentage decrease every year since 1925. * * * the total decrease from 1925 to 1930 was 69%. On top of this the building permits for the first three months of 1931 are $580,000—22%—less than for the first

three months of 1930. To get the full significance of this, bear in mind that weather conditions in the first three months of this year were much better than the corresponding period last year and also that in Portland the building permits were artificially stimulated by a very intensive modernization campaign.

Coming back to the matter of cement prices: Would say that while we cannot see our way clear at this time to make any change in them, we do feel that we can allow the Bradley-Woodard Lumber Co. order at the $3.05 per bbl. price and we will inclose a revised invoice herewith."

G. Tongue, Secretary and Sales Manager of Superior Portland, examined on this subject, testified that when the Pacific Coast Company first began business it quoted in Seattle for a time on a basis of the Concrete base price plus freight to Seattle; there came a time when the Pacific Coast Company began to cut prices there, at first sub rosa; friendly contractors and dealers advised Superior Portland that they could buy cement cheaper from the new company; the cutting varied in amount and was not confined to the Seattle market but extended practically over the entire territory they were serving; Superior Portland met the various secret price cuts as it learned of them and advised their dealers of their new prices as they became effective; the price cutting started in the latter part of 1928 and lasted thru the early part of 1931, during which prices went down to a point where Superior Portland was realizing on some of its sales around $1.00 per barrel at Concrete and there was no profit out of that;[2] when Northwestern Portland started business they also sold in Seattle at less than the Concrete base plus freight,[3] in 1928 the price in Seattle was $3.05 gross in cloth or $2.40 less sacks and discount; in June, 1931 the price went

[2] (C) Tr. 8392-94, 8397-98, 8435.

[3] Id., Tr. 8412.

up to $2.85 gross at Seattle, or $2.20 stripped; the new price was 20¢ per barrel less than in 1928.[4] The reason for absorption of the Seattle mill by Superior Portland was to secure a Tidewater Plant located in center of their largest market territory.[5]

W. P. Cameron, Manager of *Olympic*, testified on this subject that: the price war was the result of the two new companies, Northwestern Portland and Pacific Coast Cement Company, coming into the field; Northwestern Portland came in first in 1928 and its entrance did not cause a material reduction in prices; when the Pacific Coast Company first began operations, the Seattle price was stable for a little while, then in its desire to get business the prices began to decline with the result that they went from bad to worse; prices went down to $1.15 in Seattle, which netted *Olympic* 85¢ at Bellingham and continued that way for about a year; not very long after the Pacific Coast mill was leased by Superior Portland there was an advance in prices and *Olympic* followed the advance.[6]

E. Pricing — Sealed Bids.

1. Method of Determining Prices

Answers to the Commission's questionnaire of June, 1931:

Superior Portland:

"Our method of fixing our delivered prices for cement at any particular point when submitting sealed bids, has been based on the judgment of the manager of this company as to the desirability of taking the job under consideration at the price necessary, considering freight rates from all mills that might be in a position to serve the job in question.

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[4] Id., Tr. 8407-08, 8441-42.

[5] Com. Exs. 967-1 U, 968-18 B.

[6] (C) Tr. 8526-28.

No rule, no rhyme, no reason used in fixing our prices for any particular bidding in the past two years. (Com. Ex. 3174 C)

Northwestern Portland:

We have not been successful in obtaining any orders on sealed bids, therefore, we assume our quotations have been too high. (Com. Ex. 3172 E-F)

Lehigh:

• • • In cases where sealed bids are requested, the Company normally quotes its current published price for delivery at the destination in question. However, in certain instances the Company has elected to quote delivered prices lower than the Company's current published prices at the points indicated for delivery." (Com. Ex. 3143 D)

2. F.O.B. Mill Bids

The cement mills in the Washington-Oregon territory submitted f.o.b. mill bids on many occasions prior to the Code period, some during the Code period and many following the Code period.

a. Pre-Code Period

Counsel for the Commission *conceded* that it was the practice of mills in the Washington-Oregon territory to bid f.o.b. mill prior to the Code whenever requested by the government. During the examination of Commission's witness Taylor, who was in charge of the bids on cement for the U. S. Reclamation Service for some years the following took place:

"Mr. MacIntyre: If your Honor please, during that period of 1927 to 1933 I imagine that we would accept the witness' statement that appears at line 12, page 242, in which he says that during the period of 1927 to 1933 that out of 15 instances, 14 of them were f.o.b. mill bids; 15 different sets of bids." (Tr. 21557; see also Tr. 21565-66)

Taylor was cross-examined as to his general testimony to the effect that cement companies refused to bid f.o.b. mill, as follows:

> "Q. Do you know of any instance where a company in western Washington bidding on a reclamation project for use of cement in the State of Washington declined to bid f.o.b. mill? A. No.
>
> Q. Then the general statement that you made was not based upon any invitation to bid or any bids received in response thereto in a period prior to the code in the State of Washington? A. It did not refer to western Washington or any other section of the west; it was a general statement covering all our projects which were in several states." (Tr. 21570)

Documentary evidence of typical bids submitted by the respondent companies on the West Coast to agencies of the Federal Government prior to the Code Period is shown in the "Abstract of Proposals Received" by the United States Bureau of Reclamation for furnishing cement for use in the State of Washington (Yakima-Kittitas letting), opening of July 28, 1926. Spokane, Superior Portland, Oregon, Calaveras and Pacific were among the respondent companies who submitted non-identical f.o.b. mill bids with no qualifying clauses of any kind which resulted in non-identical delivered costs to the Government as follows:[1]

			With Freight
"1	Pacific Portland Cement Co.	San Francisco, Cal.	$26,330.00
2	International Portland Cement Co.	Spokane, Wash.	27,505.00
3	Balfour Guthrie & Co.	Seattle, Wash.	32,308.00
4	Superior Portland Cement Co.	" "	33,106.00

[1] (C) Tr. 21433.
Resp. Ex. 264 C-D, H.

			With Freight
5	Sun Portland Cement Co.	Lime, Ore.	$39,764.00
6	Oregon Portland Cement Co.	Portland, Ore.	38,284.00
7	Calaveras Cement Co.	San Francisco, Cal.	30,550.00
8	Henry Cowell Lime & Cement Co.	" " "	27,750.00
9	Lehigh Portland Cement Co.	Spokane, Wash.	No bid.
10	Beaver Portland Cement Co.	Portland, Ore.	" "

(Resp. Ex. 264 D)

Further evidence to the same effect is shown in the abstract of bids received by the United States Bureau of Reclamation for furnishing cement for use on the Boulder Dam project, with total requirements of 380,000 barrels, opening of January 5, 1932. Oregon, Calaveras and Pacific were among the respondent companies on the West Coast who submitted individual f.o.b. mill bids, none of which was identical with the bid of any other bidder.[1]

The Trial Examiner rejected respondents' offer to prove by further documentary evidence, tabulations of which were identified and made part of the record, and by competent testimony that *prior to the complaint* each of the respondent companies in Washington-Oregon territory and in Northern California submitted other f.o.b. mill bids to various government agencies such as the Treasury Department, War Department, Department of the Interior, and Department of Agriculture on many different projects, some of which were made prior to the Code Period, some during the Code Period and some following the Code Period; that none of said bids had any reference to control

[1] Com. Ex. 129.
Resp. Ex. 3691 A.

clauses, equalization clauses or destination costs; and that the evidence offered was a small, but representative, part of the total number of f.o.b. mill bids which were submitted to the Federal Government by the said companies prior to the Complaint.[3]

(For the evidence concerning [Price Filing and Sealed Bids During the Code Period] see Part XVII-A, pp. 2712-26, supra.)

b. Post-Code Period

Commission's witness Taylor identified an abstract of bids submitted to the Bureau of Reclamation by Superior Portland, Spokane and *Olympic* on 16,000 bbls. of cement for delivery at "shipping point and/or Pomona, Washington", opened July 2, 1936. All bids were non-identical both at mill and at destination.[1] Taylor also identified a contract which was awarded to Superior Portland on the basis of its f.o.b. mill bid for furnishing 9600 barrels of cement for the Yakima Roza project in Washington, opened June 30, 1937. The invitation was for delivery "at shipping point and/or at destination".[2]

Taylor admitted on cross-examination that he knew of no instance where any company in western Washington declined to bid f.o.b. mill in response to any invitation for bids for cement issued by the Reclamation Service, and that his statement covers the period subsequent to the Code.[3]

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[3] (R) Tr. 47699, 47704; Resp. Ex. for id. 3660 A, C-Q incl., V, Z 17, Z 20, Z 26 (Washington-Oregon companies); Resp. Ex. for id. 3660 A-J, Z 15-Z 17 incl., Z 19, Z 21, Z 23, Z 24, Z 26-Z 29 incl. (Northern California companies).

[1] Resp. Ex. 340 G-H.
(C) Tr. 21435.

[2] (C) Tr. 21584.
Resp. Ex. 345 A, J.

[3] (C) Tr. 21590.

i. *Post-Complaint*

Admiral Peoples who was in charge of the U. S. Procurement Division, testified that in his purchasing of cement prior to March 1938 he found some identical bids on a delivered basis, but he specifically excepted the mills in "The Pacific Northwest where bids had been received f.o.b. mill basis" (Tr. 9992-93). Referring to the nation-wide proposal put out by him, as of March 30, 1938, Admiral Peoples was examined thus:

> "Trial Examiner Norwood: I would like this witness to tell us, he testified when he was last on the stand, of certain steps he took in his efforts to secure f.o.b. mill bids, and I am going to ask this witness if those efforts were followed by any substantial results in that direction.
>
> The Witness: Your Honor, the results have been that on points west of Denver we have been able to obtain competition on the basis of f.o.b. mill prices." (Tr. 10221-22)

Peoples was asked:

> 'Do you have a list of the manufacturers who complied in all respects with the invitation in submitting bids?"

His answer was, "Yes." He then enumerated the companies, among which were Superior Portland, Northwestern Portland, Spokane, Monolith and Southwestern (Victorville).[1]

Admiral Peoples identified specific invitations and mailing lists and testified as to the results thereof, among which was a proposal inviting f.o.b. mill bids for 2,000,000 barrels of cement for use by the Bureau of Reclamation for the State of Washington, delivery to be made within one year. The point of delivery was not revealed. Alternate bids were invited for 5,800,000 barrels, based on a four-year delivery basis. This schedule was issued to

[1] (C) Tr. 10025.

14 companies and bids were received from the following companies: Beaver, Lehigh, Northwestern Portland, *Olympic*, Oregon, Santa Cruz, Spokane and Superior Portland. The awards were divided on account of the large quantities involved and made to Superior Portland, *Olympic*, Northwestern Portland, Spokane and Lehigh.[2] Another proposal was for f.o.b. mill bids for 5,000 barrels of cement for delivery in the State of Washington, point of delivery not revealed, under the opening of September 7, 1938. This was sent to 15 companies and bids were received from Northwestern Portland, Beaver, Superior Portland, Oregon and Santa Cruz. The award was made to Oregon, the lowest bidder.[3] Other proposals, in response to which all bids were f.o.b. mill, were for the following quantities: 250,000 bbls., 2500 bbls., 75,000 bbls., 8500 bbls., and 5000 bbls.[4]

Various proposals, and tabulations of bids submitted in response thereto by the companies in Washington, Oregon and California, were offered and received in evidence, as follows:

> "I now offer Respondent's Exhibit 369 A to Z inclusive, proposal No. 13294-SP-6-13, issued May 27, 1938, bids opened June 13, 1938, calling for 2 million barrels of low heat cement in bulk, under one schedule, and 5,800,000 barrels of cement in the alternative schedule, which was actually for Grand Coulee Dam, but the exact point of use was not revealed in the invitation.

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[2] (C) Tr. 10267-69;
Resp. Exs. 369 A, 384 A.
Com. Exs. 1404-1405.

[3] (C) Tr. 10273-74;
Com. Exs. 1422-1423.
Resp. Exs. 371 A, 384 C.

[4] Com. Exs. 1381-82, 1424-27: Mailing lists.
Resp. Ex. 384 A, B: Tabulations of bids.
Adm. Peoples (C) Tr. 10274-75.

I offer this in evidence to show that the Government requested f.o.b. mill bids and received f.o.b. mill bids, and that destination costs—and that the f.o.b. mill bid as well as the destination cost to the Government, the net delivered cost to the Government under each bid was non-identical with the other bids. I offer to show that if the Admiral were on the stand he would identify this proposal and abstract, Respondent's Exhibit 369-A to blank, inclusive, and I offer the exhibit now for the purpose of showing what I have stated." (Tr. 21793-94)

See also, to the same effect, the following:

Resp. Ex.	Proposal	Quantity
350 A-K	Nov. 17, 1937	44,000 bbls.
370 A-K	July 25, 1938	5,000 "
371 A-K	Aug. 24, 1938	5,000 "
372 A-W	Sept. 7, 1938	40,000 "
373 A-M	Sept. 12, 1938	3,500 "
		17,000 "

Similar offers of proof were made (and rejected by the Trial Examiner on ground they covered dates subsequent to the time Admiral Peoples testified) with respect to the following proposals, to show that each of the bidders bid f.o.b. mill as requested, although no destination was shown and that when the applicable freight rate from point of shipment to the point of actual use was added, the net laid-down cost to the Government at destination was in each instance non-identical with the other bids:[5]

Resp. Ex.	Proposal	Quantity
374 A-V for id.	Dec. 7, 1938	16,000 bbls.
375 A-Z " "	Feb. 27, 1939	47,000 "
376 A-ii " "	Apr. 19, 1939	200,000 "

[5] (C) Tr. 21791, 21796-803, 21805-06, 21818.

The Trial Examiner rejected respondents' offer to prove by documentary evidence, tabulations of which were identified and made part of the record,[1] and by competent testimony that each of the respondent companies in Washington-Oregon territory and in Northern California has also submitted f.o.b. mill bids to various Government agencies such as the Department of Interior, Department of Agriculture, War Department and Treasury Department on many different projects where the Government requested f.o.b. mill prices subsequent to the issuance of the Complaint, that said bids were not identical with those of other bidders and none of them had any reference to control clauses, equalization clauses or destination costs; that on a number of the said projects where the Government requested and received both types of bids the business was awarded to the bidder offering the lowest delivered price even though one or more bidders submitted f.o.b. mill prices which complied with the invitations.

c. General

None of the companies in Washington-Oregon territory ever had any agreement or understanding with anyone to bid or not to bid prices f.o.b. mill or to quote any particular prices on Government lettings or sales to other public agencies or any agreement or understanding with competitors at any time in connection with any of its bids

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[1] (R) Tr. 47677-79, 47684, 47686;
Resp. Ex. for id. 3659 Z 11, Z 34-Z 39 incl., Z 41, Z 42, Z 51, Z 52, Z 55, Z 57, Z 59, Z 69 (Washington-Oregon companies); Resp. Ex. for id. 3659 Z, Z 1, Z 19, Z 23-26 incl., Z 30, Z 34-38 incl., Z 41-Z 43, Z 51, Z 55, Z 57, Z 59, Z 64, Z 69, Z 70 (Northern California companies).

or with dealers as to the prices bid.[1] All of their bids were determined and submitted independently of any other respondent. Detailed evidence was introduced showing the independent manner in which Lehigh arrived at the prices it bid on public invitations, including contemporaneous documents used in the preparation of bids, and testimony of a responsible official of the Company describing the various steps followed by Lehigh in determining the prices which it bid.[2] The Trial Examiner excluded further proof, consisting of typical documentary evidence (bids and contemporaneous memoranda and correspondence made in the regular course of business) and testimony of responsible company officials, offered by respondents to show the independent action of, and the method employed by, each bidder in determining the prices, terms and conditions of sale actually quoted in its bids and the absence of any communication understanding or agreement with any other respondent in connection therewith.[3] Commission's counsel *conceded* that respondents never agreed upon bids.[4]

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[1] Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48118.
Tongue, Secretary, Superior Portland (R) Tr. 42898.
Bowen, Vice President, Lehigh (R) Tr. 27162.
Carpenter, former President; Statter, President, and Nelson, B. C., Secretary, Beaver (R) Tr. 47765.
Bell, Secretary, Spokane (R) Tr. 47657.
Oregon, Tr. 48102-03, (adopting Tr. 26137, 37605-06, 38733).

[2] Bowen, Vice President, Lehigh (R) Tr. 27019-20, 27023, 27028-29, 27040, 27042-43, 27054; Resp. Exs. 1301-1306, 1310-1314, 1317-1319.

[3] (R) Tr. 25698-710, 25724-28, 29762-66, 29771-72, 29779-87, 29795-98, 37890-94, 39667-69; Resp. Exs. for id. 1861, 1866, 2686, 3049.

[4] (R) Tr. 27112.

Superior Portland has never received requests for f.o.b. mill bids from State, County or City projects except for use within the immediate vicinity of its mills where delivery could not be made by rail transportation.[5] Superior Portland has continually sold the Federal Government f.o.b. mill, as for example, on the Grand Coulee Dam project (see *supra*). Superior Portland did not bid on the requirements for Bonneville Dam because its chemist could not assure the management that it could make the quality of cement demanded under the specifications, which were more difficult to conform to than those for the Grand Coulee Dam.[6]

There is no evidence that any of the respondents in Washington-Oregon territory ever declined to bid f.o.b. mill in response to government invitations at any time.[7]

The Trial Examiner rejected documentary proof that where Spokane bid the lowest price f.o.b. mill they nevertheless lost the business because the Government purchasing agency actually awarded the business on the basis of the lowest delivered price. This was shown by a letter to Spokane from the U. S. Department of the Interior, Office of Indian Affairs, dated November 14, 1935, which reads as follows:[8]

> "We wish to inform you that upon comparison of the bid submitted by you on cement at $2.50 per bbl., with bid submitted by Three Forks Portland Cement Company, we find that due to difference in freight rates, that the latter Company is the low bidder. The Three Forks Company bid $2.60 f.o.b. Trident Montana. Trident, Montana freight rate to St. Ignatius is 19¢ per cwt., and the Irvin, Wash., rate is 26¢ per cwt."

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[5] Tongue, Secretary, Superior Portland (R) Tr. 42899-900.

[6] Id., Tr. 8431-32, 8435; Com. Exs. 159, 162 A-C; Resp. Ex. 233.

[7] See Recapitulation, Part XVII-C, pp. 2834-36, *infra*.

[8] (R) Tr. 47658; Resp. Ex. for id. 3419.

F. Trucking.

1. Extent of Trucking

a. Burns-Clark Data[1]

Trucking from the mills in Washington-Oregon territory during each of the four selected months is shown in relation to the total shipments of the respective mills during the same months as follows:

Company	Mill	Per Cent of Total Shipments				Com h 977
		June 1925	Jan. 1928	June 1932	Jan. 1933	
Superior Portland	Seattle	—	—	3.5%	—	4I
	Concrete	—	.05%	0.4%	1.8%	4H
Spokane	Irvin	6.5%	2.1%	2.6%	7.3%	4J
Lehigh	Metaline Falls	—	—	3.5%	—	4K
Oregon	Oswego	24.0%	10.3%	49.0%	1.7%	3Y
	Lime	—	—	29.0%	4.0%	4E

b. Other Evidence

Company		Cit.
Superior Portland	Practically no demand for truck shipment. Possibly once or twice a year.	Tr. 8442
Oregon	Sells for delivery to everybody's trucks at mill.	Tr. 8468
	Trucks from Yakima are sold f.o.b. company's warehouse in Portland. Trucking to Yakima has been increasing since price reduction of Oct. 1, 1937.	Tr. 8469

[1] No deliveries were made during any of the four selected months in trucks owned or operated by the producer. Com. Exs. 967-1 B, 1 R, 2 H, 2 X, 3 W; 974-15 B, 15 F, 15 T.

Company		Cit.
	Sells at mill for delivery at Vancouver any way customer wants—mostly trucked.	Tr. 8510
	Some trucking to Walla, Walla, but not very much.	Tr. 8511
Northwestern Portland	No evidence pertaining to trucking.	

2. Truck Prices

There is evidence that four of the nine mills in the Washington-Oregon territory have at times imposed an extra charge for delivery to buyers' trucks, as follows:

a. Burns-Clark Data[1]

Superior Portland	"Part of the time same as car price; part of time 10¢ per bbl. up loading charge. Now charging 10¢ per barrel upon base price as service charge to trucks."
Spokane	"A service charge per barrel. For different classes of buyers such as dealers, irrigation districts, contractors, etc., we have in the past made different service charges. On March 5, 1934 we adopted the same service charge (15¢) for all classes of buyers."
Oregon: Lime	"June, 1925—Did not sell in truck lots to any extent. 50¢ above base price. Jan. 1928—Did not sell in truck lots to any extent. 50¢ above base price. June 1932—Base price in carload lots. Jan. 1933—15¢ above base price. Our policy was changed Jan. 1, 1932 and Jan 1, 1933 as above."
Oswego	"Sold at mill price. No change in policy."

[1] Com. Ex. 967-1-D, 1 T, 2 J, 2 Z, 3 X, 4 L.

b. Other Evidence

Superior Portland: Tongue, Secretary and Sales Manager testified on this subject, as follows:

"Q. What has been the policy or practice of the Superior Portland Cement Inc., with reference to selling for delivery to trucks at the mill? A. Our practice has been to discourage that wherever we could.

Q. In what way have you discouraged it? A. By advising customers that we preferred not to ship by truck.

Examiner Norwood: Have you refused to ship by truck?

A. We still do make a few shipments by truck. Pardon me. I should not say 'we ship'. We permit the customers to pick up by truck.

By Mr. Wooden:

Q. The general practice, with those exceptions you refer to, has been not to sell for truck delivery? A. Yes, sir.

Q. How long has that been your general practice? A. Oh, I think trucks have picked up some cement at our mills off and on ever since there have been trucks.

Q. Well, how long has it been your general practice to discourage it? A. Ever since we found out that trucks coming in more frequently than they had been upset our packing schedule.

Q. Wasn't one of the reasons you discouraged it that trucks took cement into territory where the delivered price was figured on a rail basis? A. No, sir; we have not had that experience.

Q. Have you charged the same price for truck delivery as for rail delivery? A. We usually charge 10 cents a barrel up.

Q. That is more for trucks? A. Yes, sir. More for trucks than for rail." (Tr. 8410-11)

And again:

"Q. You said this morning that your company charges 10¢ extra for delivery to trucks? A. Yes, sir.

Q. Is there any reason for that? A. Yes, sir. To compensate for the extra expense and time involved in loading trucks.

Q. This morning in explaining that your company discouraged trucking, you said you did it because the delivery to trucks interfered with your packing schedule. A. Yes, sir.

Q. Will you explain that to his Honor, what you mean by that? A. We have at our plants, we have bins set aside with certain kinds of tested cement in it, state work, independent laboratories, and Bureau of Standards cement. We may be packing from one of these tester bins when a truck will come along and ask for the standard cement. That will mean one of two things; either we must shut the packing plant down, clean out that bin and get to the standard, or else make the truck wait until it is cleaned out in the normal course of events. These trucks have a habit of coming in at un-Godly hours. One landed last week just about 5 o'clock in the afternoon after the packing department was shut down. The customer was terribly upset, but there was nothing we could do about it." (Tr. 8440-41)

And again:

"Q. * * * if you were to permit general trucking operations of standard cement from your mill at Concrete or at Diamond (Seattle), would it be necessary for you to install additional equipment, packing house equipment, in order to satisfy the demands of the customers? A. Yes, at both mills because neither mill is designed as a truck shipping mill.

Q. When they were originally constructed were they designed exclusively for railroad operations? A. Yes, sir.

Q. And is that the most efficient method of operation from the standpoint of your company? A. We have found it so.

Q. And would the expense of a substitution be such as to make it inadvisable to make this alteration? A. That is the way we have felt about it." (Tr. 8447-48)

And again:

"Q. What has been your experience with reference to truck rates and railroad carrier rates on long hauls? A. The rail rates are very much better for us, that is, they are cheaper than the truck rates.

Q. When you say 'for you' would that also be true of your customers? A. Our customers as well.

Q. Assuming that truck rates and rail rates were equal, are there any factors that would make one form of transportation preferable to you and to the customer? A. Well, from the Company's standpoint, we would much prefer the rail mode of transportation.

Q. Why? A. Because it is easier to handle at the plant. You are not subject to interruptions and inconveniences, you are shipping out a continuous flow of cement and when you are through packing a full carload of a tested type of cement you are through, and with trucks it would be spotty.

Q. Would there be less harassments and inconvenience to a customer and to yourself? A. Considerably less with the rail." (Tr. 8460)

Oregon: Knappenburger, Vice President of Oregon testified on this subject as follows:

"Q. I understand there is no limitation by your mill as to what trucks may take cement? A. Absolutely none.

Q. Is your Lime, Oregon, mill also open to truck delivery? A. To a limited extent, it is open to any dealer that wants to take his cement.

Q. When you sell for truck delivery, what price do you charge? A. You mean where there is a differential between the carload?

Q. Yes. A. We have a difference between carload and less than carload. If a dealer will take a car-

load of cement in two days he gets the carload price. If he just wants 30 or 40 barrels and it is not a carload, the price is 15¢ advance.

Q. How is it at the Oswego mill? A. At the Oswego mill there is no differential.

Q. Do you charge your maximum mill net on truck deliveries at your Oswego mill? A. Yes.

Q. Have you ever charged the delivered price, figured by rail, on truck delivery? A. There have been deliveries that we made by truck?

Q. Yes. A. Yes.

Q. That is, where you deliver in your own trucks, you mean? A. Or outside trucks, doesn't make any difference; we have not sufficient trucking equipment of our own to take care of all our business.

Q. But as to delivery to trucks at the mill, you charge just your maximum mill net without any regard to where the material may go? A. That is right." (Tr. 8512-13)

There is no evidence that Beaver or Northwestern Portland ever imposed a 15¢ differential or any extra charge for loading buyers' trucks at the mill.

3. Extent of Discontinuance

Superior Portland in a letter to one dealer, dated July 17, 1931, advised that on small lots it was discontinuing truck shipments from its plant, but would continue to load any trucks as usual, on orders for carload lots (132 bbls.).[1] No general announcement was sent out. There was no total discontinuance of trucking and Superior Portland continued to deliver to the dealer. Tongue, Secretary of the Company, testified to the same effect.[2] A letter dated July 27, 1936 from E. P. Lucas of Superior Portland to Garner Beckett of Riverside relative to freight rates on cement, contains the following with reference to trucking:[3]

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[1] Com. Ex. 1204.

[2] (C) Tr. 8436, 8446.

[3] Com. Ex. 640 K.

"• • • when we took over the Seattle Plant of the Pacific Coast Cement Company we stopped the trucking and gave all the business to the railroads.

Now that other territories are trucking practically 75% to 85% of their business, I am afraid that it will only be a short time until we will be compelled to resort to trucking and am frank to admit it is the most economical way.• • •"

Superior Portland never made any practice at their mills of charging the delivered price by rail to a given destination when trucks called for cement at the mill (Tr. 8412).

Beaver, in a letter to a dealer at Oakland, Oregon, dated August 29, 1931, said:[4]

"We formerly made arrangements for trucking cement from the plant by truckload but found that it created so much dissatisfaction by reason of continual overlapping of sales made possible by some of our customers taking undue advantage of the freight saving and, by ignoring the facts of truck haul costs, selling at unjustified prices, that it became necessary to discontinue entirely truck deliveries from the plant.• • •"

There is no evidence of any discontinuance of, or refusal to allow, trucking at any time with respect to Northwestern Portland, Oregon, Spokane or Lehigh at Metaline Falls.

There is testimony of responsible officials of the respondents in Washington-Oregon territory each denying that they ever had any understanding or agreement with respect to trucking policies or practices.[5]

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[4] Com. Ex. 1907 I.

[5] Bowen, Vice President, Lehigh (R) Tr. 26871, 26893.
Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48118-19.
Oregon (R) Tr. 48102-03 (adopting Tr. 37606-07).

G. Water Delivery.

Superior Portland ships some cement by water across the Sound where it is sold f.o.b. car Seattle. Superior Portland's total shipments by water amount to only a few hundred barrels per month, the yield on which is less than its base price per barrel.[1] *Olympic* ships from Bellingham by water to points on the west side of the Sound, Port Angeles, Olympic Peninsula, and has on occasion shipped by water to Seattle, but not very often.[2] In 1925 Oregon at Oswego shipped 2510 barrels of cement partly or wholly by water, the yield on which was less than its base price per barrel.[3]

None of the respondent companies in Washington-Oregon territory operates its own ships or barges.[4] There is no further evidence with respect to the use of water transportation by, or its availability to, any of the mills in Washington-Oregon territory.

H. Diversions.

Superior Portland: From time to time, subsequent to the NRA Code, Superior Portland's contract forms have contained a provision designed to prevent a dealer or other customer from diverting shipments of its cement from the stated destination to another place. Such a provision appears in the "specific job contract" form[1] used by Superior Portland beginning March 13, 1934, in the following form:

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[1] Tongue, Secretary, Superior Portland (C) Tr. 8461; Com. Ex. 972-4 H.

[2] Cameron, Manager, Olympic Portland Cement Co. (C) Tr. 8524-25.

[3] Com. Ex. 972-3 Y.

[4] Com. Ex. 967-1 B, 1 R, 2 H, 2 X, 3 W, 5 U.

[1] Resp. Ex. 3457.

[Italicized part quoted in Fdgs. Para. Seven (q), Twelve (b)]

"Buyer represents that the aforesaid number of barrels of cement will be used in the construction of the above-described work and agrees that no portion of such cement will be used for any other purpose without the written consent of Seller. *If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified;* Buyer remaining liable for all unpaid accounts."

The same provision appeared in the "Form of Future Specific Sales Contract" appended as "Exhibit C" to the Code of Fair Competition for the Cement Industry which was approved by the President of the United States, November 27, 1933, and the amended Code which was approved May 11, 1935. From March 1930, when Superior Portland first used a printed form until March 13, 1934 its contracts contained no provision with respect to diversions of shipments. It did not adopt a standard form of sales contract until the Code became effective.[2] Gordon Tongue, Secretary and Sales Manager of Superior Portland testified that the only reason for the inclusion of a provision against diversion in Superior Portland's contract forms is to protect its regularly established dealers in their home trading areas; that Superior Portland has never stamped its bills of lading with a stipulation prohibiting diversion in transit, in fact, it first learned of the alleged use of such

[2] Com. Exs. 557, 560; (R) Tr. 42912; Resp. Ex. 3456; (R) Tr. 42896.

a stipulation when the Commission instituted its proceeding against the cement industry.[3]

Northwestern Portland has never used a non-diversion stamp nor has it taken any measures to eliminate diversion. It has never used any contract form. Diversion of cars in transit has been made from time to time by its customers. Northwestern Portland has considered diversions undesirable where it would result in a diversion into another dealer's or customer's territory with the resultant loss of good will by the Company. Northwestern Portland has never opposed diversions because they might result in a different delivered price or lower net return to it.[4]

Lehigh has for many years prohibited diversions of cement shipments in transit in deference to the complaints of its dealers at the destinations to which cement has been diverted.[5]

There is no evidence that Beaver, Oregon or Spokane ever used a bill of lading stamp prohibiting diversions of cement in transit and no evidence as to whether any of them ever adopted or pursued any policy or practice whatsoever with respect to diversion of cement shipments in transit.

There is direct evidence, introduced through responsible officials of the companies in Washington-Oregon territory by which each denied that his company ever had any understanding or agreement with any competitor or with anyone regarding diversions of cement shipments in transit or ever took any cooperative measures by the use of contract provisions, or otherwise, to prevent diversions.[6]

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[3] (R) Tr. 42899.

[4] Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48118-19.

[5] Bowen, Vice President, Lehigh (R) Tr. 27248; Resp. Ex. 1120.

[6] (R) Tr. 26831, 26765, 42899, 48102-03 (adopting Tr. 26442, 37706, 38720, 39707), 48119.

I. Terms and Conditions of Sale.

1. Terms of Sale, Discounts, Etc.

Tongue, Secretary and Sales Manager of Superior Portland, testified that except during the NRA period, when it complied with the Code, substantial differences have continuously existed between its terms and conditions of sale and those of other cement companies and cited numerous specific examples of differences in discounts and terms of sale. For example, prior to, and subsequent to the Code period it followed no definite practice with respect to giving customers advance notice of price changes; its practice with reference to both price advances and price declines varies according to the circumstances of each case. (For evidence of this and divers other examples of differences in terms and conditions of sale, see Tongue's testimony, Tr. 42902-06, 8441, 8450.)

Hollister, President, and Young, Sales Manager, of Portland, Northwestern, testified that his company keeps informed of the general practices and prices of its competitors by inquiries by the company's representatives in the field and these revealed many cases of differentials, both in favor and adverse, between its prices, discount periods, prepayment of freight and cloth sack allowances, and those of competitors and that this information was used by Northwestern Portland to formulate its own sales policy. It has changed its discount terms from time to time to meet competition.[1]

There is testimony by responsible officials of the companies in Washington-Oregon territory by which each denied that his company ever adopted, or agreed to adopt the so-called Compendium or that it ever followed or agreed to follow any of the practices or methods outlined therein, or

[1] (R) Tr. 48120.

ever caused the Compendium to be circularized or distributed to its own sales force or to dealers or any other persons or parties. Some witnesses testified that some of their practices were similar to those collected in the Compendium and many of their practices were dissimilar.[2]

Eleven samples of differences between the practices of Superior Portland and those set forth in the Compendium by Article and Section are set forth in the testimony of the witness Tongue. (See Part X B, *supra*, pp. 1848-49.)

There is no evidence that any of the Washington-Oregon companies ever made any use of the Code of Ethics of The Cement Institute and there is affirmative evidence to the contrary. The Code of Ethics was cancelled prior to the time that any of these companies, except Lehigh, became members of the Institute. Lehigh did sign the Code of Ethics in 1929 or 1930 but made no use of it. A responsible official of Lehigh testified that it did not consider that that constituted an agreement and continued to follow its own policy of operations in just the same way as it had done before.[3] (For citations and evidence of differences between practices of companies in Washington-Oregon territory and those set forth in the Code of Ethics, see Part X B, *supra*, p. 1835.)

Responsible executives appeared on behalf of the companies in Washington-Oregon territory and each denied expressly that his company ever entered into any understanding or agreement with any competitor, or with anyone

[2] Tongue, Secretary, Superior Portland (R) Tr. 42908.
Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48117,
Bowen, Vice President, Lehigh (R) Tr. 27003.
Oregon (R) Tr. 48102-03 (adopting Tr. 37608).

[3] Resp. Exs. 143 A-D, 2173 A-D, 2174 C; (C) Tr. 8469-70, 16699, 16927-29; (R) Tr. 27002-03, 27298-99.

regarding prepaid freight, sack allowances, discounts, or any other terms and conditions of sale.[4]

2. Contract Forms

Superior Portland has never made it a general practice to use specific sales contract forms for sales to dealers or others in the ordinary course of business, but they have been used to a limited extent. Samples of the first printed contract form, which was adopted by Superior Portland in March 1930 (Resp. Ex. 3456), the revised form which it adopted on March 13, 1934 (Resp. Ex. 3457), and a "specific sales order" form, which it has used infrequently since the Code period (Resp. Ex. 3463 A-B) were identified by the witness Tongue, Secretary and Sales Manager of the Company, for comparison with the forms used by other respondents during the same periods and those submitted with the NRA Code for the Cement industry and the so-called Compendium, to show the modifications effected as a result of the Code, and the substantial differences existing with respect thereto.[1] Tongue also identified samples of specific work quotation forms which have been used by Superior Portland since the NRA Code period (Resp. Exs. 3458 A-B, printed March 13, 1934; 3459 A-B, printed December 31, 1934; 3460 A-B, printed June 15, 1935; 3461 A-B, printed April 22, 1937; and 3462 A-B, printed January 9, 1940) for comparison and testified that the forms Superior Portland has employed were changed from time to time independently and denied that they ever

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[4] Tongue, Secretary, Superior Portland (R) Tr. 42902, 42908, 42911.
Hollister, President, and Young, Sales Manager, Northwestern Portland (R) Tr. 48118-19.
Bowen, Vice President, Lehigh (R) Tr. 26821, 26930-31.
Oregon, Tr. 48102-03 (adopting Tr. 37608).

[1] (R) Tr. 42896-97.

entered into any agreement with The Cement Institute or with any other company as to what forms they would employ.[2]

Hollister, President, and Young, Sales Manager, of Northwestern Portland, testified that his company never used any contract form and has never agreed with any other cement company or with The Cement Institute or any other organization as to any contract form; on a few rare occasions prior to November, 1933, quotation forms were used in Northwestern's own discretion and not upon the suggestion or by the direction of any competitor or organization. A sample of that form, last used in October, 1933, was identified by Hollister and introduced in evidence for comparison with contemporaneous forms used by other respondent companies.[3]

The testimony of Oregon is that there have been no substantial changes in its contract forms since the expiration of the Code; it has not been influenced by the Cement Institute as to the form of contract used; it has never had any agreement with competitors or others regarding the terms and conditions in its contracts at any time.[4]

Bowen, Vice President of Lehigh, testified that Lehigh has had no understanding or agreement with any of its competitors as to the use of the provisions in its various contracts or the conditions appearing in its various forms and orders, that Lehigh has always been free to use whatever contract forms its experience taught was best for its own interest, except during the time of the NRA when it was required to include in its forms certain provisions as set forth in the Code.[5] See Resp. Ex. 1120 for form of specific work contract in current use by Lehigh.

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[2] (R) Tr. 42896-97.

[3] (R) Tr. 48118; Resp. Ex. 3789.

[4] (R) Tr. 48102-03 (adopting Tr. 26442, 39509-10).

[5] (R) Tr. 26821-22.

J. Imported Cement.

Beaver admits that small quantities of cement of foreign manufacture are imported into the territory in which its sells its products.[1] Officials of Northwestern Portland testified that it has sold cement to dealers who also handle foreign cement and has met the competition of foreign cement with intensified sales efforts; its appeal to its customers is on the basis of quality, and fairness to American labor and industry.[2] There is no evidence that Spokane or the Metaline Falls mill of Lehigh ever sold cement in competition with imported cement and no evidence as to whether they ever had any policy or practice with respect thereto.

1. Denials of Agreement

There is testimony of responsible officials of the respondents in Washington-Oregon territory by which each denied that his company had ever taken any steps or measures or ever adopted or pursued any policy or practice with respect to competition with imported cement, or ever had any understanding whatsoever with anyone regarding competition with imported cement.[1]

There is no evidence with respect to so-called zone, "arbitrary", or other special prices to meet imported cement competition in the Washington-Oregon territory.

2. Complaints Against Dumping

On August 8, 1933 L. C. Newlands of Oregon wrote to E. P. Lucas, Trustee of The Cement Institute for District 12, about the importation of foreign cement through

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[1] Answer to Par. 7, sub. par. (h) of Count 1.

[2] (R) Tr. 48120-21.

[1] (R) Tr. 26973, 42895, 42908, 48102-03 (adopting 26196, 26206, 26211), 48121.

the Port of Portland. The letter sets forth the origin, volume of shipments, and prices at which the foreign cement was being retailed and adds:[1]

> "May I request that the matter of these importations be placed immediately before The Cement Institute for investigation and looking toward the cessation of these imports. Their cement, of course, is manufactured under conditions totally dissimilar to those under which we now operate, namely the National Industrial Recovery Act, and the marketing of their cement in Oregon at this time undoubtedly constitutes unfair competition on their part."

G. R. Gay of Santa Cruz, joined in the above request in a letter to Lucas, dated August 10, 1933, stating:[2]

> "I am prepared to verify the price at which this cement is being offered, as stated in Mr. Newland's letter, which as you will notice, is very much less than the price established for American made portland cement, which only provides for a reasonable profit and which is not reflected by the difference between the price at which the foreign cement is being sold and that established for American made cement.
>
> The Santa Cruz Portland Cement Company has enjoyed a proportion of the business in Portland for over 25 years and for this reason are genuinely interested in preserving this territory to American manufacturers, especially under conditions as they exist today."

A letter dated January 5, 1937, from Reiter, General Manager of The Cement Institute, to F. M. Coogan of Alpha (Chairman of the Tariff Committee), states that Reiter visited E. C. Corkhill, Chief of the Division of Appeals and Protests of the U. S. Bureau of Customs, concerning the general matter of imports of foreign cement,

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[1] Com. Ex. 644 K.

[2] Com. Ex. 644 H.

that the Bureau of Customs was then working on several complaints alleging the dumping of cement, one of which has been filed from Portland, Oregon, the proof being based on the difference in price of the material in the country from which shipped and the price at which offered and sold at the port of entry, and that Corkhill asked the Institute to assist him in securing information in the cases involving cement imports.[3]

Tongue, Secretary and Sales Manager of Superior Portland, testified that his Company cooperated with The Cement Institute in efforts to obtain tariff legislation to prevent the dumping of foreign cement.[4]

K. Cement Institute.

The evidence is that all of the Washington-Oregon companies, except respondent Spokane, but including the non-respondent, Olympic, joined The Cement Institute[1] in June 1933[2] with the advent of the NIRA in order to participate in the formulation of a Code for the cement industry. None of them, except Lehigh,[3] was ever a member of the Institute prior to the NRA period. In connection with the submission of the proposed NRA Code to the various districts for approval E. P. Lucas of Superior Portland was elected a member of the Board of Trustees of The Cement Institute representing District No. 12 which com-

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[3] Resp. Exs. 741, 750 A-B; Com. Ex. 619 B (see also Part XI, pp. 2014-15 re activities of the tariff committee).

[4] (R) Tr. 42895; Com. Ex. 591 G.

[1] Fdgs., Par. 1 (L, 2 L, 2 O, 2 W, 2 Z, 3 L, 3 O); Resp. Ex. 2173 B-C; (C) Tr. 2809, 8523-24.

[2] Northwestern Portland first became a member in July 1933 after the Cement Code Authority was set up. Id.

[3] Lehigh, which resigned from the Institute in March 1931, rejoined in June 1933. Id.

prised the Washington-Oregon territory. At a meeting of the Board of Trustees on November 20, 1934, Lucas was elected a member of the Code Authority.[4] Oregon resigned from the Cement Institute effective December 10, 1936.[5]

Some of the mills in Washington-Oregon territory furnished statistics on production to the Bureau of Mines only and furnished no sales or shipment statistics to anyone. Some companies furnished the Cement Institute with only such figures on production and shipments as they furnished to the United States Bureau of Mines.[6]

Responsible officials of the Washington-Oregon companies each denied expressly that his company ever operated pursuant to any plan for sharing available business or that it ever had any understanding or agreement with anyone to limit or restrict production or to exchange contracts. They further denied that they ever used any contract checking or credit reporting services, or other special services furnished by The Cement Institute. They further denied that they ever gave any reports or information to The Cement Institute or any other organization or company on contracts awarded in their market territory or on sales policy, or ever had any agreement or understanding with respect to exchange or cancellation of contracts, except that during the NRA period they followed the Code.[7]

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[4] Com. Ex. 606 A; Resp. Ex. 1823 A-D.

[5] Resp. Ex. 127 C.

[6] (C) Tr. 8454; (R) Tr. 42895, 47657, 48117.

[7] Northwestern Portland: (C) Tr. 8384; (R) Tr. 48116-17, 48186-87.
Oregon: (R) Tr. 48102-03 (adopting Tr. 26136, 26441-42, 37243, 38691, 40096).
Superior Portland: (R) Tr. 42895-96.

The Cement Institute performed valuable services for Superior Portland in assisting it in obtaining refunds of compensating processing taxes.[8]

There is testimony of responsible officials who appeared individually on behalf of each of the Washington-Oregon companies, denying that the Institute or any of its officers, trustees or committees, has ever influenced or attempted to influence them in the matter of prices or price policy or has ever participated or acted in any way to affect any of the company's competitive policies or practices. Responsible officials of these companies further denied that they ever regarded the Institute or the Trade Practice Committee as a formulator of policy with respect to prices or conditions under which they might or might not sell, or that they ever had any agreement or understanding with any members of the Institute, or with any of its committees which did or could restrict them from selling in any manner in which they individually chose.[9]

Pacific Coast Cement Institute

(See Part XVII-C.)

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[8] Tongue, Secretary, Superior Portland (R) Tr. 42895.

[9] Beaver: (R) Tr. 47765.
Lehigh: (R) Tr. 27607-08.
Oregon: (R) Tr. 48102-03 (adopting Tr. 26136-37, 26208, 26211, 26441-42, 37217, 37607-08).

PART XVII-C—SOUTHWESTERN (Victorville)

A. Plant Location, Capacity and Products.

Merrill, Vice President and General Manager of Southwestern, testified that his company is not affiliated with any other cement company and none of its officers or directors is an officer or a director of any other cement company. Southwestern's Victorville plant was built in 1915-16 and has been kept modern and up to date by constant maintenance and technological improvements to reduce costs and improve the quality of its products. The productive capacity of the Victorville plant was expanded prior to 1928 by installation of larger units; it has a capacity of about 6,000 barrels a day and has produced and shipped over 1,600,000 barrels annually, operating at practical capacity; during the last four or five years it has operated at about 75 or 80% of capacity. The Victorville plant site was selected with careful regard for close proximity to raw materials, water supply and adjacent markets for the sale of its products; it is located on the Atchison, Topeka and Sante Fe and The Union Pacific Railroads.[1] Partridge, Sales Manager of Southwestern (Victorville) testified that his plant produces a number of special specifications and special purpose cements, as well as standard Portland cement. He expressly denied that his company ever had any agreement or understanding with any of its competitors regarding the quality of its cement, the number of different cements it would produce, the specifications it would follow, or the raw materials or quantities thereof which its cements would contain.[2]

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[1] (C) Tr. 8784, 8791-92; (R) Tr. 47665-66. Resp. Ex. 3765.

[2] (R) Tr. 47662-63.

B. Sales Areas.

Merrill testified that the extent of territory in which Southwestern's Victorville plant markets its cement depends upon the volume of business available in nearby markets and more distant markets, the cost of securing orders, the cost of transportation, the net realization at the mill, the service which Southwestern is able to render in comparison with competitors and the prospective value to the company of customers in a given market; at present it sells in central and southern California (including San Luis Obispo, Kern and Inyo counties), southern Nevada, western Arizona and the Hawaiian Islands and in those markets it has to meet the competition of nine cement plants in California, two cement plants in Utah, and two cement plants in Colorado. It also markets some cement in northwestern Mexico where it meets competition from Mexican as well as domestic cement plants.[1] The Metropolitan area of the city of Los Angeles is its chief consuming area. Competition has been increased by the establishment of a clinker grinding mill at Los Angeles in 1929 and a cement silo storage at Long Beach, Cal. in the latter part of 1934, which has made more intensive solicitation necessary throughout the entire marketing area of the Victorville plant.[2]

C. Pricing—Commercial.

1. Non-Use of Basing Points.

Commission's witness, Casto, testified that in connection with his investigation for the Commission late in 1936, he questioned Merrill, Vice President of Southwestern,

[1] (R) Tr. 47666.

[2] Partridge, Sales Manager, Southwestern (C) Tr. 8796.
Com. Ex. 976-14 T: Answer to Burns and Clark questionnaire.

with regard to whether or not a "basing-point system" was in existence in the Southern California area and Merrill said that it was a modified zoning system, that there were two base mills, Crestmore and Col on, but that the mill base as used out there was not the same idea as the mill base used in the East.[1] Commission's witness, Royal, testified that Merrill's statement to him was that Southwestern did not use basing points in southern California and that no basing points were in use there.[2] Merrill testified that because of the widely differing competitive conditions existing around the Victorville plant, the management of Southwestern has left the matter of sales policy and pricing in the hands of the local sales manager with the instructions only to meet competition and get all he can for cement.[3] Partridge, who has been Sales Manager of Southwestern's Victorville since 1926, was examined with respect to the use of basing points, as follows:

"*By Mr. Wooden:*

Q. Mr. Partridge, has your mill at Victorville ever been known as a basing-point mill? A. It has not.

Q. Have you known of the mills, Crestmore and Colton, being considered basing-point mills? A. Well, it is my understanding that Crestmore was an established base way back during the time of the War Industries Board.

Q. And how lately have you known as it being base? A. Well, as such, I don't believe I would be qualified to say.

Q. Have you based your prices at times on the Crestmore mill base? A. No, we have not."[4]

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[1] (C) Tr. 9122, 9125-26, 9130.

[2] (C) Tr. 21661-63.

[3] (C) Tr. 8795, 8869-70; (R) Tr. 47669.

[4] (C) Tr. 8934-35; (R) Tr. 47660.

And again

> "Q. Haven't you recognized the existence here of a basing-point system modified by a zone system? A. No.
>
> Q. You haven't recognized that any such thing exists? A. No, that does not apply in this trade territory.
>
> • • •
>
> Q. On the question of Colton and Crestmore: Do you base any prices on them as basing points? I mean, do you figure them as basing points in figuring your prices? A. We do not because we don't use that method of compiling prices.
>
> Q. So that you don't use either of those? A. We do not, in making up our prices.'"[5]

The origin of Crestmore as a basing point is described in the testimony of Beckett, President of Riverside, as follows:

> "In 1910, Riverside Portland Cement Company, the predecessor of Riverside, came into the Southern California field. At that time the price at Los Angeles was $2 per barrel. The Kansas mills gradually withdrew from the market. Prices to the surrounding communities were arrived at by adding freight from Los Angeles to the price of $2 at Los Angeles. This method continued until about 1917, when the War Industries Board designated the Crestmore mill of Riverside Portland Cement Company as the basing point for southern California. Thereafter, during the period of the war maximum emergency prices at Los Angeles and Southern California destinations generally were fixed by the War Industries Board as the Crestmore base price plus freight to destination. Riverside's price lists reflected the policy of basing on Crestmore until about 1927, when due to the activity in the Los Angeles Metropolitan area and the prevalence of local trucking of cement, it became impractical to observe disparities in prices reflecting rail freight differentials between nearby

[5] (C) Tr. 8939, 8959.

or adjacent communities. The establishment of zone prices * * * followed."[6]

Beckett testified that Riverside's prices in the Southern California area are determined by reference to its current price list and to information picked up in the field by its salesmen without reference to or use of the factors of base price plus all-rail freight; that in quoting, or making changes in its prices Riverside makes no use of such a formula as the prevailing price at the governing basing point plus an all-rail rate of freight to the customer's location.[7]

Blair, Chief Clerk in Charge of Sales of the California Portland Cement Company, testified that the prices at which his company sells cement in California are not made up of a mill price plus freight to the destination, that for more than ten years California has sold at blanket prices for trade areas in Southern California and has disregarded the differences in the freight rates from its mill, and the mill or shipping point of any competitor, to the various destinations within a trade area.[8]

2. Zone Prices

(Foreword: The evidence introduced by the Commission on this subject, as to pricing and marketing methods as well as sales, was received over respond-

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[6] (R) Tr. 42870-72, 42865.
To the same effect:
Partridge, Sales Manager, Southwestern (Victorville) (C) Tr. 8934.
George, General Manager, Cowell (C) Tr. 8785.
Com. Ex. 958-4 H: Treanor, President, Riverside to Prof. Clark, Aug. 27, 1935.
Com. Ex. 971-23 A.

[7] (R) Tr. 42879.
To the same effect:
Leonard, Vice President, Riverside (C) Tr. 9082-83, 9087.
Partridge, Sales Manager, Southwestern (C) Tr. 8899, 8902.

[8] (R) Tr. 42460, 42709.

ents' objection to it, generally, as incompetent, irrelevant, and immaterial to any of the issues in the proceeding and, specifically, on the ground that it has to do entirely with intrastate business and has not been shown to come within the supervision of the Commission. The Trial Examiner said: "It is apparent that it relates entirely to intrastate". The Trial Examiner ruled, however, that "the Commission may receive that to throw light on the business methods of this Respondent who is in interstate commerce." He ruled, further, that it is understood that respondents' objection applies also to the *use of price lists* (reported *infra*) in intrastate business. Counsel for the Commission *conceded* that the sales and marketing methods within the State of California are not the same as those used in Arizona or other interstate territories.)[1]

[*Partridge* testified that there are a number of points in southern California where prices are the same in a very large area which might be termed a zone, regardless of differences in the cost of delivery. Referring to his company's price list, Partridge testified that the territory in which the flat price prevails extends from the mountains to the sea and down almost to San Diego County on the south and up to the Ventura County line on the north. Beyond this flat price zone there are a great many differences in price. Ventura County has the same price at most points unless they happen to be very far removed from the mountain district, where there is a differential over the general flat price. The price at San Diego is about 20¢ a barrel higher than the price in the uniform price zone and towards the Imperial Valley the prices are proportionately higher. The price at El Centro is 36¢ a barrel higher.[2] Southwestern (Victorville) has made shipments into the following zones of uniform delivered prices: "Los An-

[1] Tr. 8887-89, 8902.

[2] (C) Tr. 8886-87, 8890-91.
Com. Ex. 1280 A-G.

geles, Calif. Metropolitan Area. Los Angeles County, Ventura County, Santa Barbara County south of Gaviota, Calif., Orange County, Riverside County, Imperial County, San Bernardino County south and west of Cajon Pass."][3]

The origin, and reasons for the use of, zone prices in Southern California was described in the testimony of Beckett, President of Riverside, as follows:

> "The zone method of quoting prices was first put into effect by Riverside in 1927. The reasons for the adoption of the zone system was primarily the following: The Los Angeles Metropolitan area consists of numerous contiguous communities, to many of which a different rail freight rate from Riverside's mill was applicable. The rail rates as between different destinations within such area varied, so that a dealer located in one community or section under a system of price base plus freight, was required to pay a higher price for his cement than a dealer in an adjacent community. The result was that the former could not compete with his more advantageously situated neighbor, who did not hesitate to truck into his territory. Riverside was besieged by complaints from these disadvantageously located dealers, and in order to allow them to compete on an equal basis with other dealers within the area, the zone system was adopted. Gradually it spread throughout the whole of Southern California where cement is purchased."[4]

Leonard, Vice President and General Manager of Riverside, testified that in so far as zoning in Southern California is concerned the situation has been in a constant state of flux, and has been changing all the time.[5]

[Various announcements, price lists, zone maps and letters explanatory thereof, issued by Riverside to dealers in Southern California establishing minimum resale prices

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[3] Com. Ex. 976-14 P.

[4] (R) Tr. 42874.

[5] (C) Tr. 9082.

for its cement under the Fair Trade Act of the State of California, are in evidence.][6]

The testimony of Blair, Chief Clerk in Charge of Sales of California, on this subject, is that for more than ten years his company has maintained blanket prices for trade areas in Southern California and has disregarded the differences in the freight rates from its mill, and the mill or shipping point of any competitor, to the various destination points within a trade area; that the boundaries of the various trade areas in Southern California for which blanket prices have been fixed and the prices fixed for the various trade areas have been changed from time to time to meet competitive conditions, regardless of differences in freight rates from his company's mill, and the mill or shipping point of a competitor, to the various points within the respective trade areas.[7]

3. Use of Price Lists

[Commission's witness, Royal, testified that he interviewed Merrill and that Merrill told him that Southwestern uses destination prices entirely and the destination price is figured on the known prices quoted by other cement companies at the particular destination, that Southwestern has received price lists from Cowell and Santa Cruz but Riverside put out price lists most frequently, that he personally does not know whether Southwestern receives cop-

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[6] Leonard, *supra* (C) Tr. 9087.
Com. Ex. 1975 A-B: Riverside announcement dated Oct. 28, 1927 rel. to minimum resale price plan.
Com. Ex. 1976: Riverside Zone Map of 1927.
Com. Ex. 1203 O, P: Riverside announcement and list of dealers minimum resales prices of cement dated Jan. 15, 1930.
Com. Ex. 1297: Riverside Zone Map, April, 1936.
Com. Ex. 971-23 A-B: Letter dated Sept. 25, 1935 from Leonard, Sales Manager, Riverside to Prof. Clark, rel. to Riverside's zoning policy which was established during 1927.

[7] (R) Tr. 42460.

ies of price lists put out by Riverside, and that Merrill denied that there was any understanding that Riverside would publish its price lists periodically.[1] Royal testified that he discussed with Partridge Southwestern's use of other companies' price lists and that Partridge told him that in quoting prices Southwestern made use of a price list and zone map put out by Riverside in Southern California.[2] Royal testified that he had a discussion with Beckett of Riverside in January or February, 1932 with reference to zones or zone prices, and that Beckett said that Riverside issued a zone map that showed the territory within Greater Los Angeles and surrounding suburbs and this zone map was used in connection with its price lists, that Riverside usually included the map in mailing the price lists to customers and competitors and that the other companies in Los Angeles followed Riverside's prices.][3]

Partridge was examined on this subject at some length. He testified that his company wants to get as much as it can for its cement but it has found that in order to do business it must meet the lowest price at which any competitor has offered to sell cement at any given destination point.[4]

Partridge testified, further, that Southwestern (Victorville) publishes lists of prices on its cement and distributes these lists to its customers by way of advising them of its prices. The management has determined that in the area where the Victorville plant markets its cement the distribution of price lists has definite advertising value and impresses customers more than individual quotations.[5]

[Southwestern (Victorville) distributed its first general price list to the trade in compliance with the Code in 1933

[1] (C) Tr. 21671-72 21678-79.

[2] (C) Tr. 12842-43.

[3] (C) Tr. 12848-49.

[4] (C) Tr. 8898; also (R) Tr. 47660.
Merrill, Vice President, Southwestern (C) testified to the same effect. Tr. 8870.

[5] Partridge, Sales Manager, Southwestern (R) Tr. 47662.

and since that time it has fallen into the practice of publishing price lists and giving them general distribution. It issued some lists prior to that time but not as a general practice. Riverside's price list was distributed to the trade generally prior to the Code and for a number of years Riverside was the only company that made a practice of putting out a price list to the trade. This was an entirely individual action on Riverside's part.[6] Southwestern (Victorville) mailed its price list to other competitors in the area when it was issued to the trade. It has received price lists from Santa Cruz and from the other three companies in Southern California during the Code period. Southwestern has not received price lists from those companies for the period since the Code.[7] Southwestern's (Victorville) price lists are made up independently, and are based upon the best knowledge it has of what its competitors are quoting in any area. Southwestern (Victorville) bases its price list upon the last known market price at each destination, sometimes referred to in Partridge's testimony as the "going price", the "established price", and "a competing price". It attempts to sell at the market price wherever it sells its cement.[8] Southwestern (Victorville) uses no freight calculations in making up its price lists or in making changes thereto. It does not attempt to calculate prices by adding various factors. It sells at delivered prices as it finds them. The only use it makes of freight rates is to figure out what its mill net was.[9] At times Southwestern (Victorville) has used Riverside's price list as a basis of comparison in finding out the destination prices at various places and it also checked with dealers and with its own salesmen in the field to find out whether that price was the market price before it used it.[10]

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[6] Id. (C) Tr. 8894, 8900-01, 8952-53.

[7] Id. (C) Tr. 8895-96, 8904.

[8] Id. (C) Tr. 8903, 8898, 8917-18, 8954, 8956.

[9] Id. (C) Tr. 8897-98, 8900, 8902, 8917, 8936, 8938-39, 8955.

[10] Id. (C) Tr. 8895, 8936, 8953-55.

The dealers' price lists, and the various supplements thereto, issued by Southwestern (Victorville) since January 1, 1935 were furnished to the Commission at its request and were introduced in evidence.[11]

a. Price Changes

Partridge testified that a good many times Southwestern (Victorville) has had to amend price lists that it attempted to put into effect, by supplement, due to changes made by its competitors.[1] Partridge described the policy and practice of his company in handling price changes, as follows:

"*By Mr. Wooden*:

Q. If a competitor puts out an increased list, you follow it? A. If it pleases us, we do.

Q. Doesn't it please you? A. Ordinarily, it would.

Q. Have you put out any different prices in your price lists in the last two years than the lists of your competitors? A. Oh, yes.

Q. Can you give specific instances of it? A. Well, we attempted, for instance, in one price list that I recall—I don't know the exact date—a flat

[11] Tr. 8912-13.

Price List	Dated	Com. Ex.
Cal., Ariz., & Nev.	June 2, 1935	1284
" " "	Oct. 21, 1935	1285
" " "	Nov. 26, 1935	1282
So. California	Apr. 1, 1936	1286
So. Calif., Ariz., & So. Nevada	Oct. 12, 1936	1281
So. California	Nov. 10, 1937	1287
Arizona	Nov. 10, 1937	1288
So. Nevada	Nov. 10, 1937	1289
So. California	Nov. 30, 1937	1280
Arizona	Nov. 30, 1937	1290 A-E
So. Nevada	Nov. 30, 1937	1291
So. Nevada	Apr. 6, 1938	1290 F, G, 1292

[1] (C) Tr. 8904.

increase of 18 cents a barrel. I can give you the date, too; it was on November 10 preceding this list.

Q. 1937? A. Yes.

Q. You mean you put out an increase that others didn't follow, or what? A. It so happened that they didn't follow and we had to revise it to the present list."[1]

And again:

"*By Mr. Wooden:*

Q. Mr. Partridge, did I understand you to say that you put out a price list dated November 18, 1937? A. I believe it was November 30, 1937.

Q. Did you put one out that you had to withdraw, or did withdraw? A. That was November 10th.

Q. Was that list ever actually put into effect? A. No, it was not.

Q. It was just a tentative list that you withdrew? A. We canceled it and substituted therefor the list dated November 30, which we just looked at.

Q. Were you the first one to get out the November 30th list? A. We were.

Q. Who was? A. We were.

Q. You were. What changes were made compared to the prices that were in effect before that time? A. It was 10 cents a barrel less.

Q. All through the various areas? A. That is correct.

Q. What was the occasion for the 10-cent reduction? A. We found one of our competitors were quoting 8 cents a barrel increase instead of the 18 that we proposed.

Q. So you came down to the eight? A. We came down to the eight.

Q. Who was that? A. Coulton, California Portland.

Q. Did you get out the first price list proposing an 18-cent increase? A. We did.

Q. Now, in cases like that where you were the first one to get out an increase in price, how did you go about determining what the prices were to be at the different points within the various areas or zones? A. Well, in that particular instance, we

[1] (C) Tr. 8903.

merely added the 18 cents to our then existing price list.

Q. What was the occasion for the 18-cent price increase? A. We thought that the price should be advanced 18 cents per barrel.

Q. Was there any particular occasion for the advance? A. Well, had a discussion of it. I discussed it with the management and we felt that the additional costs that we were subject to should justify an 18 cents a barrel increase and we were hopeful that we could put it up 18 cents. That is all there was to that.

Q. What additional costs do you have reference to? A. Well, those factors that could probably be better explained by someone familiar with the operating end of it: Increase in labor costs, and power, and fuel. Those are usually the factors that are taken into consideration.

Q. You had increases in those last November? A. I believe we did.

Q. What instructions do you give your assistants when you tell them to make up a new list? A. Well, in that instance, it is merely a matter of reissuing a price list 18 cents a barrel higher than our present list. That is merely a matter of routine, adding 18 cents a barrel to all the points shown in the price list, and having the printer print it for us.

Q. How many points were involved in which you found that competitors were not following your 18-cent advance? A. Oh, that I couldn't say. We picked it up in enough places to convince us that that was the increase instead of the 18-cent increase.

Q. Did you find they failed to follow it at all points, or just at some points? A. Naturally, we couldn't say that we found they failed to follow it at all points because that would be a physical impossibility, but we found enough to convince us that our competition were not going to raise the price 18 cents a barrel.

* * *

Examiner Norwood: You were on the look-out for those first quotations, were you?

The Witness: We certainly were."][1]

[1] (C) Tr. 8909-11, 8954-55; Com. Exs. 1287, 1280 A-G.

Southwestern's (Victorville) price advance on November 30, 1937 was made applicable in Arizona and So. Nevada as well as in California.[4]

Southwestern (Victorville) has no uniform practice as to how much notice it will give in case of price changes.[5]

4. Prices in Arizona

In Arizona cement is sold at price listed destination prices.[1]

The Commission introduced in evidence freight tariff schedules issued July 22, 1937 covering Arizona stations and supplements thereto on file with the I. C. C. to and including March 23, 1939.[2] In evidence also is a tabulation of the freight rates on cement from Crestmore, California and El Paso, Texas, to all carload stations in the State of Arizona in effect July 1, 1937 and a similar tabulation of the rates in effect on January 1, 1939,[3] based upon the official tariff schedules on file with the I. C. C.[4] These statements show that there are about 360 carload freight stations in Arizona which carry the same freight rate from Crestmore, El Paso, or from both. For more than ten years the commercial freight rates from the four mills in Southern California and from the El Paso mill to Phoenix and all the other destinations in Arizona which constitute the principal markets for cement have been the same. All four Southern California mills have equal freight rates to

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[4] Id. (C) Tr. 8917; Com. Exs. 1290 A-E, 1291.

[5] Id. (C) Tr. 8965-66.

[1] Price lists cit., *supra*.

[2] Com. Ex. 3057 A-B.

[3] Resp. Exs. 3475 A-K, 3480 A-K.
The Trial Examiner rejected maps which show these rates graphically. Resp. Exs. for id. 3514-3515; Tr. 46696.

[4] Resp. Exs. 3468 A-H, 3469 A-N, 3470 A-B, 3471 A-F, 3472 A-D, 3473 A-F, 3474 A-D, 3476 A-O, 3477 A-B, 3478 A-E, 3479 A-D. Ussery (R) Tr. 46146, 46148-51.

all of the *western* parts of Arizona except the town of Yuma.[5]

Due to the freight rate structure there are a number of towns in the *eastern* part of Arizona, none of which is an important market for cement, which carry a lower freight rate from El Paso than from Crestmore or Victorville. For example, as of May 1, 1938 the stations of Tuscon, Globe, Nogales and Bisbee carried the same freight rate of 34¢ per cwt. from El Paso. The rate from Crestmore to Tuscon was 34¢ per cwt., while the rates from Crestmore to Globe, Nogales, and Bisbee were 43¢, 36¢ and 40¢ per cwt., respectively. The rates from Victorville to the same four stations were 37¢, 47¢ 39¢, and 42¢ per cwt., respectively. Accordingly, prices quoted by the mills in Southern California to meet the destination prices of the El Paso mill at such towns would reflect varying mill nets.[6]

On March 28, 1938 a 10% increase in freight rates was authorized, effective April 8, 1938. To meet this increase in freight rates a flat increase in prices of 10¢ per barrel was applied at all destinations as shown in Southwestern's Supplement No. 2 to dealers price list for Arizona, dated April 5, 1938, which reads:

> "Due to the freight increase which becomes effective April 8, 1938, in line with the recent order of the Interstate Commerce Commission, all prices on our products as shown in our price list and supplement thereto are increased 10¢ per barrel effective with cars leaving our Victorville, California, and El Paso, Texas, mills April 8, 1938.

[5] Blair, Chief Clerk in Charge of Sales, California (R) Tr. 42732-33, 42464.
Duque, Vice President, California (C) Tr. 9321-23.
Resp. Exs. 3475 A-K, 3480 A-K, *supra*.

[6] Southwestern price lists cit., *supra*.
Com. Ex. 1313 K-P: California's price list, eff. Apr. 8, 1938.
Com. Ex., 1317 C: Statement of freight rates from So. Calif. mills to points in Arizona, in force May 1, 1938.
Resp. Ex. 3480 A-K, and tariffs cit., *supra*.
Blair, Chief Clerk, California (R) Tr. 42733.

A new price list will be issued in the near future for your information.'[7]

The above price increase remained in effect until December 1938 when a new price list was issued which again lowered prices 10¢ per bbl.[8]

There has never been any zoning arrangement similar to metropolitan Los Angeles, nor any zone prices, in Arizona. The price pattern in Arizona is determined by the freight rate.[9] Charts and testimony introduced by Commission which purported to show the existence of zone prices in Arizona were stricken from the record.[10]

Partridge testified that Southwestern's shipments into Arizona are usually made from its El Paso mill. In central Arizona, and to all of the Salt River Valley around Phoenix, the rates from Southwestern's two mills are equal, and in southern Arizona the El Paso mill has more favorable rates out as far as a point west of Tucson. To some extent the freight rates determine from which mill Southwestern will ship into Arizona but the principal factor is that under normal business conditions El Paso has a sparsely settled trade territory and, therefore, Southwestern tries to ship what business it can from that mill.[11] Blair, Sales Manager of Southwestern's El Paso mill, testified that as to sales in Arizona west of Phoenix Southwestern attempts to ship everything from its

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[7] Com. Ex. 1290 H.
Com. Ex. 1290 A-E: Southwestern price list, dated Nov. 30, 1937.
Com. Ex. 1295-8 M-8 S, 9 L-9 R: Riverside's price list, effective April 8, 1938.
Com. Ex. 1312 K-P: California's price list, effective April 8, 1938.

[8] Resp. Ex. 108: Riverside's price list, effective Dec. 1, 1938.
Resp. Ex. 109 B-F: California's price list, dated Dec. 22, 1938.

[9] Partridge, Sales Manager, Southwestern (C) Tr. 8917.

[10] Com. Ex. 2833; Tr. 16194.

[11] (C) Tr. 8884-86.

Victorville plant because it has a lower freight rate to that part of Arizona, and that consequently very little business is shipped from either of Southwestern's mills into Arizona territory in which the mill shipping has a freight disadvantage with competitors.[12]

The more populous portion of Southern California is separated from Nevada and Arizona by mountain ranges and wide stretches of desert. The desert country is very sparsely settled and has very few and very limited markets for cement. Such markets have consisted almost entirely of public highway work and dam, canal and water system construction. Because of the wide separation between market centers and dealer points in eastern California, western Arizona and southern Nevada, there is no opportunity for competition between dealers at California points and dealers at Arizona and Nevada points.[13]

There is no evidence that any respondent company in California ever sold any cement to a purchaser for delivery at a California point for re-sale or re-delivery in Arizona or Nevada, or ever sold any cement to a purchaser for delivery at an Arizona or Nevada point for re-sale or re-delivery in California, and there is testimony expressly denying that any such sales were made.[14]

5. Sales Below Published Quotations

Partridge testified that he became Sales Manager of Southwestern's (Victorville) plant in 1926 and prior to that, from 1917 to 1926, he was a salesman covering all of the territories in which Southwestern (Victorville) marketed its products; that from time to time Southwestern's salesmen have reported advice from dealers that competi-

[12] (R) Tr. 39325, 39327-28.

[13] Blair, Chief Clerk, California (R) Tr. 42500-01.
Com. Ex. 1297: Riverside Zone Map, April, 1936.

[14] Id. (R) Tr. 42501.

tors have offered to sell them cement at prices lower, by varying amounts, than the last known publicly quoted prices at the respective destinations in question and friendly dealers of the company have called Southwestern's Los Angeles office direct and reported price concessions offered to them by its competitors; such information usually reaches Southwestern's office within a few hours after the concession has been made; that price reductions and secret price concessions by Southwestern have not increased its volume of sales because competing manufacturers meet lower prices as soon as they learn of them and customers continue to purchase from their regular sources of supply.[1] Other executives of Southwestern testified that they have found its competitors making price cuts off and on ever since they have been in business, and that repeated evidence of competitors' prices below the open market has caused Southwestern to quote lower prices.[2] Officials of other cement companies in Southern California testified that they found through information received from customers that all competitors, including Southwestern, have sold at prices different from the ones quoted in their price lists for short or long periods; that it is their experience that competitors meet cut prices for cement, whether on an f.o.b. mill or destination bases, as soon as they learn of them, which tends to result in general price decreases with no permanent shift in any company's customers and this tendency operates to discourage price cutting; that in most cases the issuance of a new price list has been preceded by price cutting which has gradually increased in extent until the old price list no longer states the prices actually in use.[3]

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[1] (R) Tr. 47660-61.

[2] Blair, Sales Manager (R) Tr. 39230-31.
To the same effect: Com. Ex. 976-14 X.

[3] Leonard, General Manager, Riverside (C) Tr. 9039.
Blair, Chief Clerk in Charge of Sales, California (R) Tr. 42469, 42548-50.

Counsel for the Commission *conceded* that the level of cement prices is not in issue.[4]

6. Absence of Agreement

There is testimony by Partridge, Sales Manager of Southwestern (Victorville) since 1926, denying that his company has ever been a party to any agreement or understanding with any of its competitors relating to the manner in which the prices for its cement were arrived at or calculated. Partridge testified that Southwestern has at all times been free to quote and sell its products at any price acceptable to it; that with the sole exception of the joint bids and contracts resulting therefrom, hereinafter reported in this Part XVII-C, pp. 2842-44, *infra*, Southwestern has never had any understandings or agreements with any of its competitors relating to prices; further, that the terms and conditions of sale on which Southwestern (Victorville) has marketed its cement have always been arrived at by the independent action of the management solely with regard to the best interests of the Victorville plant.[1] Commission's witness Royal testified that Merrill, Vice President of Southwestern, denied that there was any understanding between his company and its competitors regarding prices or price lists.[2] There is testimony by the responsible officials of each of the other California cement companies with which Southwestern competes expressly denying the existence of any understanding or agreement with any com-

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[4] Tr. 29176.

[1] (R) Tr. 47661-63.
To the same effect: Com. Ex. 976-14 Y (reported, *infra*).

[2] (C) Tr. 21679.

petitor or competitors at any time with reference to their methods of sale or methods of pricing.[2]

D. Pricing—Sealed Bids.

1. Method of Determining Prices

Southwestern (Victorville) replied to the Commission's questionnaire of 1932: "We make our prices based on the last known quotation made".[1] Partridge, Sales Manager of Southwestern (Victorville), testified that whether his company quotes the same price on a sealed bid as it does to a dealer depends upon the nature of the project. On government projects or municipal projects of considerable size Southwestern would bid lower than its list price. Southwestern tries to anticipate what competitors will bid. On any public bidding there is always the previous record of bids to go by and Southwestern would base its quotation on the last bid price unless it thought competitors were going to bid lower. On small quantities sometimes the established list price is bid.[2]

2. F.O.B. Mill Bids—Federal Government Agencies

The evidence is that it has been the regular practice of Southwestern (Victorville) to bid f.o.b. mill to agencies of the Federal government since long prior to the Code Period.

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[2] Calaveras: (R) Tr. 42853-54.
California: (R) Tr. 42448, 42478, 42709.
Monolith: (R) Tr. 48110.
Pacific: (R) Tr. 42838-39.
Riverside: (R) Tr. 42877-78.
Santa Cruz: (R) Tr. 42863-64.
Yo[illegible] (R) Tr. 42846.

[1] Com. Ex. 3154.

[2] (C) Tr. 8919-21.

a. Pre-Code Period

See testimony of Commission's witness Taylor, Purchasing Agent of the U. S. Bureau of Reclamation, reported in Part XVII-B, pp. 2784-85, *supra*.

b. Code Period

For the evidence concerning [Price Filing and Sealed Bids During the Code Period,] see Part XVII-A, pp. 2712-26, *supra*.

c. Post-Code Period

Southwestern (Victorville) bid f.o.b. mill in response to the invitation of the Bureau of Reclamation for bids "f.o.b. shipping point and/or Boulder City, Nev." on 30,000 bbls. of cement in bulk for use on Boulder Dam, opened December 18, 1935. The other bidders were Riverside, California, Monolith and Union. No land grant rate was involved. Southwestern's price was identical with Monolith's but not identical with any of the other bidders.[1]

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[1] Resp. Ex. 290 A, H.
Taylor, Purchasing Agent, Bureau of Reclamation (C) Tr. 21434.

RECAPITULATION

Compliance by Pacific Coast Cement Companies With Federal Government Requests for Bids

(As shown by Invitations to Bid and Tabulations of Bids in Evidence)

Agency	Barrels	Request F.O.B.	Compliance F.O.B.	Citation
Pre-Code Period				
Bur. of Reclam.	10,000	mill	mill	Resp. Ex. 264 C, H
id.	380,000	mill	mill	Com. Ex. 129
Navy Dept.	15,500	destn.	destn.	Com. Ex. 1099 A
Total	405,000			
Code Period				
Bur. of Reclam.	16,000	mill and/or destn.	mill, destn. & Govt. Destn. Cost	Com. Ex. 114 A-B
id.	1,500,000	mill	mill	Com. Ex. 134 C, E
id.	10,000	mill and/or destn.	Govt. Destn. Cost	Com. Ex. 111 F
War Dept. (Eng'rs)	300,000	mill or destn.	mill and destn.	Com. Ex. 159 (23)
id.	300,000	mill and destn.	mill and destn.	Com. Ex. 162 A-C
Navy Dept.	7,900	destn.	destn.	Com. Ex. 1099 D
Total	2,133,900			

Agency	Barrels	Request F.O.B.	Compliance F.O.B.	Citation
Navy Dept.	14,000	destn.	destn.	Com. Ex. 3215
Procurement Div.	250,000	mill	mill	Com. Exs. 1381-1382
id.	2,000,000	mill	mill	Resp. Ex. 384 A Com. Ex. 1404
id.	2,500	mill	mill	Resp. Exs. 369 A-B, 384 A
id.	75,000	mill	mill	Resp. Ex. 384 A
id.	8,500	mill	mill	Resp. Ex. 384 B
id.	5,000	mill	mill	Resp. Ex. 384 B
id.	5,000	mill	mill	Resp. Ex. 384 B
id.	5,000	mill	mill	Resp. Exs. 370 A, 384 C Com. Ex. 1418
id.	40,000	mill	mill	Resp. Exs. 371 A, 384 C Com. Exs. 1422-1423
id.	20,500	mill	mill	Resp. Exs. 372 A-B, 384 C Com. Ex. 1424
Total	7,127,800			Resp. Exs. 373 A-B, 384 C Com. Exs. 1426-1427

Southwestern submitted an f.o.b. mill bid of $1.73 per barrel in response to the invitation of the Bureau of Reclamation for bids on 35,000 barrels of cement for delivery "at shipping point and/or Earp, California," for use on the Parker Dam, opened February 14, 1936.[2] Reference to the abstract of bids reveals that all bids submitted were non-identical, as follows:[3]

	Bid Price	Freight	Disc.	Cost
Southwestern	60,550	—	7,000	
Monolith	50,050	19,740.00	—	69,790.00
Cowell	47,250	44,741.37	3,500	88,491.37

On a few small lettings of the U. S. Bureau of Reclamation subsequent to the Code Period, Southwestern (Victorville) submitted bids as follows:

January 14, 1937—Salt River Project, Mesa, Arizona: 12,000 barrels. The bidders were the four mills in Southern California, *Cowell*, and a dealer. Southwestern, Monolith, and *Cowell* bid f.o.b. mill. Southwestern's bid was identical with Monolith's but not identical with any of the other bidders. California, Riverside and the dealer bid f.o.b. destination from which the Government deducted the commercial freight to arrive at a mill price.[4]

April 9, 1937—Salt River Project, Mesa, Arizona: 11,000 barrels. The bidders were the four mills in southern California, Santa Cruz and *Cowell*. Southwestern's bid f.o.b. mill was identical with the bids submitted by the other mills in southern California but was not identical with Santa Cruz or with *Cowell*. Santa Cruz bid f.o.b. destination from which the commercial freight was deducted by the Government to arrive at a mill price. *Cowell*, who was

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[2] Resp. Ex. 355 A.

[3] Resp. Exs. 273 H, 355 A.
Southwestern offered cash discount 20c. per barrel for payment by 10th of following month. Monolith bid no discount.

[4] Resp. Ex. 296 N.

the low bidder f.o.b. mill, was not the low bidder at destination.[5]

April 9, 1937—Boulder City, Nevada: 12,000 bbls. The bidders were the four Southern California companies, Union, *Cowell* and Santa Cruz. Santa Cruz and Monolith bid f.o.b. destination from which the Government deducted the commercial freights to arrive at a mill price. Southwestern and the other bidders submitted f.o.b. mill bids. Southwestern's bid was identical with the bids of California and Riverside. Equal freight rates from the four southern California mills had been provided by the railroad. The price was a result of bidder competition on Government orders over a series of prior biddings. The award was made on the basis of lowest delivered cost resulting from Union's low f.o.b. mill bid.[6]

On a few small letfings of the Bureau of Supplies, U. S. Navy, calling for delivery f.o.b. San Diego, California, Southwestern (Victorville) and some of the other California companies bidding quoted the market price as shown by the current price lists.[7]

The Trial Examiner rejected respondents' offer to prove by documentary evidence, tabulations of which were identified and made a part of the record,[8] and by competent testimony, that *prior to the complaint,* Southwestern

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[5] Resp. Ex. 297 K, N.
Com. Ex. 3261 I.

[6] Com. Ex. 135 B.
Resp. Exs. 292 B-M, 3785.
Com. Exs. 1225, 1244, 1245: Santa Cruz price lists and supplements thereto for Southern Nevada, effective to April 8, 1937.
Blair, Chief Clerk, California (R) Tr. 42811-22.

[7] Com. Exs. 3212 (opened November 8, 1935); 3213 (opened May 29, 1936); 3214 (opened January 8, 1937); 3215 (opened May 18, 1937).
See also Part XVII-A, p. 2700, *supra.*

[8] Resp. Ex. for Id. 3660 a, b, d, l, p, u, z incl., z8-z10 incl., z17, z19, z21-z23 incl., z25, z27, z29.

(Victorville) submitted f.o.b. mill bids to government agencies such as the Treasury Department, War Department, Department of Interior, and Department of Agriculture on many different projects, some of which were made prior to the Code Period, some during the Code Period and some following the Code Period; that none of said bids had any reference to control clauses, equalization clauses or destination costs; and that the evidence offered was a small, but representative, part of the total number of f.o.b. mill bids which Southwestern (Victorville) submitted to the Federal Government prior to the complaint.[9]

i. *Post Complaint*

Southwestern (Victorville) repeatedly bid f.o.b. mill in response to invitations of the Procurement Division when no destination was disclosed. See testimony of Commission's witness Admiral Peoples, and the documentary evidence relating thereto,[1] reported in Part XVII-B, pp. 2788-91, *supra*.

There is no evidence that Southwestern (Victorville) ever declined to bid in response to an invitation which failed to disclose the destination.

The Trial Examiner rejected respondent's offer to prove by documentary evidence, tabulations of which were identified and made part of the record[2] and by competent testimony, that subsequent to the date of the Complaint Southwestern (Victorville) submitted f.o.b. mill bids to various government agencies on more than *one hundred* different projects where f.o.b. mill prices were requested, that Southwestern's bids were not identical with those of other bidders and made no reference to control clauses,

[9] Tr. 47699, 47704.

[1] Tr. 10025, 10021, 10272, 10275; Com. Exs. 1418-1419, 1422-1423, 1426-1427.

[2] Resp. Exs. for Id. 3659 a-i incl., p-w incl., Z8, Z9, Z13-Z15 incl., Z17, Z20, Z22, Z27-Z30 incl., Z46-Z49 incl., Z55-Z68 incl., Z74.

equalization clauses or destination costs, and that on many of the said projects where the government requested and received both types of bids the award was made to the bidder offering the lowest delivered price although one or more bidders submitted f.o.b. mill prices which complied with the invitations.[3]

The Trial Examiner rejected documentary evidence of typical sealed bids submitted by Southwestern (Victorville) in response to invitations of the U. S. War Department, Los Angeles, abstracts of which were identified by Commission's witness Rice[4] and made part of the record, as follows:[5]

> Bids opened 9/1/38, and 12/19/38, for furnishing cement for use at Glendale, California, and for use at the Prado Dam. Bids were submitted on both invitations f.o.b. shipping point and also f.o.b. job site at the Government's option. All prices, f.o.b. destination as well as f.o.b. mill, were, in each case, non-identical.[6]
>
> Bids opened 9/2/38 for 50,000 bbls. of cement "for delivery f.o.b. railroad cars at Contractor's shipping point." Results of the bidding were as follows:[7]

	Riverside	Southwestern	California	Graham Bros.	Monolith
Net price f.o.b. shipping point	74500.00	81500.00	79000.00	92500.00	74000.00
Government freight cost	6425.80	8768.50	5225.00	4845.00	6175.00
Net price f.o.b. destination (Burbank, Calif.) ...	80925.80	90268.50	84225.00	97345.00	80175.00

[3] Tr. 47677-79, 47684, 47686.

[4] Rice was attorney for the Corps of Engineers handling all problems relating to contract matters, purchase of materials, and deciding questions as to procedure. Tr. 1436.

[5] (C) Tr. 21901, 21905, 21417-18.

[6] Resp. Exs. 241, 246 for Id.

[7] Resp. Ex. 244 for Id.

The Trial Examiner rejected an offer of proof that the following language, appearing in U. S. War Department Invitations which were identified by Rice and made part of the record, was typical of the Government's requests for bids in Southwestern's (Victorville) marketing territory.[8]

> "Bids are requested under either or both options. Award will be made under the option which will secure for the Government the lowest delivered cost at the job site."[9]
>
> "Bidders are advised that bids based on delivery to the job site will be considered and award made on such basis, provided a lower cost to the Government can be secured through acceptance of such bids."[10]

3. F.O.B. Mill Bids—Other Public Agencies

Southwestern (Victorville) has submitted f.o.b. mill bids to other public agencies when requested. For example, its bid to the Los Angeles Department of Water & Power covering 200,000 barrels of cement to be furnished in various quantities during a period of two years, f.o.b. cars or trucks at mill or shipping point, opened August 23, 1935, was not identical with that of any of the other four bidders. Nicklin, Purchasing Agent of the Los Angeles Department of Water & Power, identified the abstract of bids[1] and testified that this was not the only occasion on which his department purchased cement f.o.b. Victorville. [Nicklin testified, further, that lately his department has specified in its invitations that it wants prices for delivery f.o.b. various zones in order to reduce the number of different prices whereas previously its invitations showed the various rail-

[8] (C) Tr. 21417-18, 21901, 21905.

[9] Resp. Ex. 247 A-E for Id.

[10] Resp. Exs. 243 A-Q, 245 A-N for Id.

[1] Com. Ex. 1303 A-B.

Agency	Barrels	Request	Compliance	Citation
Post-Code Period (to Sept. 26, 1938)				
		F.O.B.	F.O.B.	
Bur. of Reclam.	4,220,000	mill or destn.	mill and destn.	Com. Ex. 112 D
id.	30,000	mill and/or destn.	mill	Resp. Ex. 290 A, H
id.	7,000	mill and/or destn.	mill and destn.	Com. Ex. 118 B
id.	16,000	mill and/or destn.	mill	Resp. Ex. 340 A, H
id.	12,000	mill and/or destn.	mill and destn.	Resp. Ex. 296 A, N
id.	35,000	mill and/or destn.	mill	Resp. Exs. 273 H, 355 A
id.	107,000	mill and/or destn.	mill and destn.	Resp. Ex. 344 A, K, L
id.	11,000	mill and/or destn.	mill and destn.	Resp. Ex. 297 B, K, N Com. Ex. 3261 I
id.	12,000	mill and/or destn.	mill and destn.	Com. Ex. 135 B
id.	9,000	mill and/or destn.	destn.	Com. Ex. 120 B
id.	160,000	mill or destn.	mill	Com. Ex. 124 A
id.	44,000	mill and/or destn.	mill	Resp. Ex. 350 K
Navy Dept.	12,000	destn.	destn.	Com. Ex. 3212
id.	12,500	destn.	destn.	Com. Ex. 3213
id.	14,800	destn.	destn.	Com. Ex. 3214

road stations thereby requiring an excessive number of prices.[2] The prices bid by Southwestern (Victorville) in response to the recent invitations of the Los Angeles Department of Water and Power were the commercial carload prices in effect at the corresponding points indicated on the map of twelve zones prepared by that purchasing agency in October, 1936 and incorporated in its bid forms.][3]

4. Joint Bids

On one or two occasions prior to the complaint Southwestern (Victorville) has submitted bids to agencies of the Federal Government jointly with one or more southern California cement companies on cement requirements for large construction projects. These projects either involved quantities and delivery requirements so great that Southwestern was not prepared to bid on the entire quantity individually or specifications which required the manufacture of new and untried cements which Southwestern was not prepared to assume the sole responsibility for.[1]

The first joint bid was in response to the U. S. Bureau of Reclamation Invitation for Bids No. 3333 A for a total of 380,000 barrels of cement for Hoover Dam and appurtenant works, opened January 5, 1932.[2] This letter of transmittal from the joint bidders to the Bureau of Reclamation, dated January 2, 1932, explained the reasons which lead the several companies to adopt this procedure:

> "The companies feel a deep obligation to the employees of their respective plants to maintain as high a rate of operation as possible during the

[2] (C) Tr. 9307-10, 9314; Com. Exs. 1300-1301 (openings of December 3, 1936 and January 11, 1938).

[3] Com. Ex. 1302; Tr. 9305.

[1] Merrill, Vice President, Southwestern (R) Tr. 47667-68. Com. Ex. 976-14 S: Answer to Burns and Clark questionnaire.

[2] Com. Ex. 129.

existing depression so that each of them will be able to give employment to the maximum number of men. In pursuance of this aim they have agreed to submit a very low price for the cement called for in your invitation for bids. But none of the parties desires to bear the entire burden of furnishing this large quantity of cement at the bid price. They have, therefore, mutually agreed to divide the responsibilities involved in proportions roughly corresponding to the capacities of their several plants.'"[3]

This joint bid was submitted after consultation with representatives of the Bureau of Reclamation who were advised that a joint bid was being contemplated and who expressed a desire to receive such a bid in order that the Government would be assured of a constant source of supply and a highly uniform product, to be obtained by blending of the cements produced at the several mills of the respective joint bidders, as well as the added protection afforded by the joint liability of the bidders. Acceptance of the bid and award of the contract based thereon was approved by the Comptroller General of the United States who also approved the bidding procedure for use in other instances under similar circumstances.[4] In response to a request from the Secretary of the Interior for a ruling with respect to the right to combine bids the Comptroller-General replied on February 8, 1932:

"* * * where the submission of a joint and several bid by two or more bidders, no one of which would be prepared to bid on the entire quantity proposed to be supplied, clearly results in extending competition to the advantage of the United States, the provisions of Section 3709, Revised Statutes, do not require objection by this office to the consideration of such a joint and several bid in making the award, assuming, of course, there appears nothing suggesting possible violation of other laws.

[3] Com. Ex. 128.

[4] Id. (R) Tr. 47668.

If the bid of the four companies is accepted, the contract with said four companies should be a joint and several contract, and the performance bond, also, be joint and several.'"[5]

[During the Code Period, in response to the invitation of the U. S. Bureau of Reclamation to bid upon 1,500,000 barrels of cement for Boulder Dam, opened March 26, 1934, Southwestern (Victorville) submitted a bid jointly with the other three companies in Southern California guaranteeing to furnish f.o.b. mill, an aggregate of 300,000 barrels monthly.[6] Prices bid on this invitation, both for Item 1 calling for special low heat cement and Item 2 calling for standard cement, were filed with the Code Authority, pursuant to the NRA Code.][7]

Subsequent to the complaint, in response to a request of the Bureau of Reclamation for bids either f.o.b. mill or f.o.b. destination at the option of the bidder on 160,000 bbls. of special low heat cement for use on the Parker Dam Project, opened October 13, 1937, Southwestern (Victorville) submitted a joint f.o.b. mill bid with Riverside and California.[8]

In each case in which Southwestern participated in a joint bid the purchaser was advised in advance of the intention to submit a joint bid and the facts and reasons therefor, and all contracts and agreements between the bidders were submitted with the bids for the approval of the purchaser. In each case the joint bid named special prices which were considerably below the commercial prices being

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[5] Resp. Ex. 3691 C.

[6] Com. Ex. 134 C, E.

[7] Com. Ex. 133 A-B.

[8] Com. Ex. 124 A.

quoted at the time in markets adjacent to the location of the project.[9]

E. Methods of Delivery.

1. Trucking

a. Extent of Trucking

i. *Clark-Burns Data*

Trucking from Southwestern's (Victorville) plant[1] in relation to total shipments, as computed from the figures shown in the company's answer to the Burns-Clark Questionnaire for the four selected months, was as follows:

Month	Percent of Total Shipments[2]
June 1925	.6%
Jan. 1928	.18%
June 1932	24.5%
Jan. 1933	65.0%

ii. *Other Evidence*

Partridge, Sales Manager of Southwestern (Victorville) testified that on commercial business at least 80% of deliveries from the Victorville plant is made by truck, principally by Company-owned trucks; Southwestern (Victorville) has in the past sold to dealers' trucks at the mill and still uses some dealers' trucks. The amount of dealer trucking is, and has been for some time past, very slight.[1]

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[9] Id. (R) Tr. 47669; (testimony of officials of Riverside and Monolith was to the same effect. Tr. 42877, 48110).

[1] Includes deliveries to buyers in trucks owned, operated or hired by Southwestern (Victorville). Com. Ex. 974-14 X.

[2] Com. Ex. 972-3 W.

[1] (C) Tr. 8942-43.

b. Truck Prices

i. *Testimony*

Partridge testified that Southwestern (Victorville) sells to dealers' trucks at the mill at the delivered cost and allows them the scheduled trucking rate for the particular haul, as established by the Railroad Commission of the State of California for truck transportation. The dealer gets the official truck rate even though his trucking cost is less and therefore gets the benefit of any saving he could make between his actual trucking cost and the official trucking rate. If the dealer's trucking cost would actually be more than the established rate he would let Southwestern haul the cement. There have been instances where dealers trucked into higher priced territory and upset the market, which was one of Southwestern's (Victorville) reasons for discouraging dealer trucking.[1]

Commission's witness, Casto, testified that he discussed with Merrill, Vice President of Southwestern, the question of selling to dealers' trucks and Merrill told him that there would be so many trucks in the business as to render the thing impracticable because practically each dealer would want to have his own truck and that such an arrangement would probably result in varying prices in that some dealers would truck the cement to a given destination more cheaply than others, which would necessarily influence the costs of the cement company using a particular dealer.[2]

Merrill testified that Southwestern (Victorville) generally has quoted prices on its commercial business on an f.o.b. destination basis but has in some cases quoted prices f.o.b. plant.[3]

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[1] (C) Tr. 8943, 8960, 8969.

[2] (C) Tr. 9126-27.

[3] (R) Tr. 47667.

ii. *Clark-Burns Data*[1]

How prices were calculated when delivery was made to the buyer's truck at Southwestern (Victorville) mill:

> "• • • we do not charge a mill price (destination price less rail freight) for deliveries to buyer's trucks at our mill. We charge the destination price only, and if a buyer's truck or a truck hired by the buyer calls at our mill we pay the buyer separately for the hauling on the basis of the rail rate. Incidentally, we should like to see this practice eliminated and a regulation made that will make it impossible for a purchaser of cement to haul cement, but our competition thinks otherwise.
>
> • • •
>
> At some periods we have established an arbitrary price at mill for truck pick-ups to avoid such pick-ups at mill by dealers and others. At other periods we have charged destination cost and paid rail freight rate for the trucking as at present.
>
> • • •
>
> If we recall correctly, although we are unable to give dates, if an arbitrary truck pick-up price was made at the mill it was usually on the basis of 10¢ per barrel over the published destination price at Victorville, where our mill is located."

Changes in Southwestern's (Victorville) policy:

> "Periodic slight changes made necessary by competitive conditions."

Effect of Trucking on Southwestern's (Victorville) mill nets:

> "Former 100% rail shipments now changed to practically all truck deliveries from our mill. • • • As far as truck shipments are concerned; after we decided to meet our competition on this basis this type of transportation generally increased our mill nets at most destinations until the rails reduced their

[1] Com. Exs. 971-10 L, 976-14 R, 14 U.

rates to meet truck competition. After such reduction in rail rates, generally speaking we neither gained nor lost although there still are points where truck shipments give us a better mill net than rail shipments."

c. Differential in Rail Rates Between Mills in Southern California

Partridge testified that the present rail freight from Southwestern's (Victorville) mill into the Los Angeles market is 6½¢ a hundred pounds. The same rate is applicable from Monolith and this rate is 2¢ a hundred higher than the rates from Crestmore and Colton.[1]

A copy of a telegram dated October 14, 1929 from Koffman, Secretary of Southwestern to Powell, President of the same company, reads in part:[2]

"MEETING TODAY ESTABLISHING TRUCKING PRICES DELIVERED TO DEALER WAREHOUSES OR JOBS APPROXIMATELY ONE CENT SACK OVER OUR CARLOAD LIST ACTION EFFECTIVE SIXTEENTH OCTOBER."

Partridge was examined about the meeting referred to above, as follows:

"*By Mr. Leisure*:

Q. Do you recall whether or not there were many meetings with railroad officials in the course of this controversy over freight rates? A. Yes, there were a number of meetings with railroad——

Q. What was the controversy about? A. Well, it is a matter of differentials in freight rates between the so-called inner and outer mills here, Riverside and Colton being grouped as inner mills. I am speaking of the way the Railroad Commission refers to it, and so forth, and Monolith and Victorville as the outer mills.

Q. And would the interest of your mill be the same or different from the interests of some of the

[1] (C) Tr. 8885.

[2] Com. Ex. 1272.

other mills in this controversy? A. Well, in this particular controversy our interests would be identical with Monolith, and Riverside and Colton would be thrown in the other group seeking the same differentiation over the outer mills.

Examiner Norwood: And give them advantage over you, too?

The Witness: It would, and that is what they were seeking and finally got.

By Mr. Leisure:

Q. But as far as meetings with the railroad officials were concerned, were they for the purpose of each group of mills securing advantage over the other mills? A. We were fighting for a long-established one-cent differentiation, whereas the other mills were asking for a two-cent differentiation.

* * *

By Mr. Wooden:

Q. That adjustment was made, was it, Mr. Partridge, so as to—what was the adjustment that was finally made? A. The present differentiation is 2-cents a hundred pounds on rail freight.

Q. That is truck rate over the rail rates? A. No, that is the rail rate, Mr. Wooden. That is one of the reasons we are now trucking most of our cement because the railroads granted the so-called inner mills a two-cent differentiation over us, whereas it had existed for a good many years on the basis of one-cent a hundred.

Q. When was that done? A. Oh, a year or so ago, two years, maybe.'"[3]

The fight respecting the differential in rail rates to Los Angeles between the inner and outer mills and the efforts of the railroads to obtain authority for revised rates to enable them to meet the competition of trucks was summarized in the decision of Commissioner Carr of the California Railroad Commission, as follows:

[3] (C) Tr. 8961-63.

"An outline of the present situation respecting the movement of cement in Southern California is incomplete without at least a sketchy background of the long continued struggle over the volume, but mostly over the differential, in rates between the inner and outer mills into the great Los Angeles consuming center—a struggle marked by the adroit and sometimes ruthless use, now by one mill and now by another, of various means of transportation in order to advance or to enforce its particular policy or contention. In its earlier stages the railroads were the victims and the highway carriers the beneficiaries. With the advent of plant facility trucks at one mill and the threat of a spread of this form of transportation to the other mills, the private truck carriers find themselves in much the same position as the railroads, each seeking a rate adjustment which may yield to them some cement business at a compensation slightly above cost, as against the competition of proprietary trucks, as to which, of course, there is no public control or regulation.

* * *

Here the real competitive factor is not the private carrier truck but the plant facility truck. * * * The history of cement rate controversies before this Commission negatives the idea that such threats by the mills are mere idle gestures. Rather, they must be considered so real and so imminent that the railroads are fully justified in acting before such competition becomes a reality and the cement business is lost to them irrevocably."[4]

2. Water Delivery

Southwestern (Victorville) makes comparatively very small shipments beyond Los Angeles Harbor by water. These shipments result in very unsatisfactory mill nets and are more of an accommodation than regular solicita-

[4] Com. Ex. 640 D-E: Quoted in letter dated Aug. 5, 1936 from Beckett (Riverside) to Lucas (Superior Portland).

tion. During the selected months of June 1925, January 1928, June 1932 and January 1933 Southwestern (Victorville) shipped a total of 160 bbls. of cement partly or wholly by water. Southwestern (Victorville) has made no deliveries by water shipment at rates less than the all-rail. It has not operated its own ships or barges. Boat shipments to San Diego, California, by Northern California competitors have affected prices in Southwestern's (Victorville) market territory and have had the effect of lowering its mill nets on sales to the destinations influenced by these shipments.[1]

3. Absence of Agreement

Southwestern's (Victorville) has never received or used any freight rate books published by The Cement Institute. The Victorville plant maintains its own traffic department which calculates freight rates for rail and for truck delivery, using the official railroad tariffs for the former and trucking rates published by the California State Railway Commission for the latter.[1]

Partridge, Sales Manager of Southwestern (Victorville), testified that the Victorville plant does not use freight rate calculations in making up its price lists or in quoting prices; the only use it makes of freight rates is to figure its mill nets.[2] There is further testimony by Partridge expressly denying that his company has ever had any agreements or understanding with any of its competitors at any time relating to the use of methods of delivery or the charges therefor.[3]

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[1] Com. Exs. 971-10 L; 972-3 W, 3 X; 976-14 P, 14 S, 14 U. Cf. Fdgs., Par. 23 (b).

[1] Merrill, Vice President, Southwestern (R) Tr. 47667.

[2] (C) Tr. 8897-98, 8900, 8917, 8936, 8938-39, 8955.

[3] Id. (R) Tr. 47662.

F. Imported Cement.

Victorville has made shipments into the following port territories: "San Diego, Calif. and vicinity, Los Angeles Harbor, Calif., and vicinity, Hawaiian Island."[1] Partridge, Sales Manager of Victorville, testified that his company has on occasion had to reduce its price on a specific job when it was a matter of competing with foreign cement, but that it has never put in any so-called "arbitrary" prices to meet the competition of foreign cement.[2] Victorville has never taken any action to combat the sale of foreign cement except to try to persuade prospective purchasers, by force of reason and patriotism, to buy Victorville cement.[3] No appreciable quantity of foreign cement has been imported into the Southern California sales area in the last ten years. The statistics relative to imports of foreign cement into Los Angeles show that since 1930 such imports averaged less than 2,000 bbls. per year.[4]

G. Limits of Marketing Areas.

1. Testimony

Partridge, Sales Manager of Southwestern (Victorville), testified that his company's gross sales include freight because sales are made on a destination basis. Net sales would be the actual net with all the transportation factors and bags and discounts taken out. Southwestern guarantees safe delivery of cement shipped by rail and in

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[1] Com. Ex. 976-14 P: Answer to Burns and Clark questionnaire.

[2] (C) Tr. 8927-28.
Com. Ex. 976-14 J: *Supra.*

[3] Merrill, Vice President, Southwestern (R) Tr. 47669.

[4] Blair, Chief Clerk, California (R) Tr. 42459-60.
Beckett, President, Riverside (R) Tr. 42882.

actual practice it is responsible for loss or damage to the cement after it is delivered to the railroad.[1] The Victorville plant realizes varying mill nets from its sales to customers at different destinations, including sales in Arizona and Nevada, due to different destination prices and variation in the cost of delivery. In each case, Southwestern is selling at a price made necessary to meet competition and the varying mill nets are due to the meeting of competition.[2]

See also prices in Arizona, this Part XVII-C, pp. 2826-29, *supra*.

Partridge was examined about nearby sales as follows:

"*By Mr. Wooden*:

Q. How large a place is Victorville? A. A very small place.

Q. How large or how small? A. Well, I don't really know the population of Victorville, but I think it is principally made up of employees of our company.

Q. Do you have any local markets near Victorville? A. Very little.

Q. Do you have any dealers in Victorville? A. Yes; there is a lumber yard there.

Q. Handling your cement? A. I think so.

Q. What is the price at Victorville of your standard cement? A. Well, I believe the price at Victorville is—the dealers' cost is about $1.80 net stripped of sacks and discount.

Q. And in paper what does that come to? A. Twenty cents a barrel higher; $2.'"[3]

And again:

"Q. Your delivered price by car is the same at the mill as in Los Angeles, isn't it? A. That is right.

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[1] (C) Tr. 8941-42, 8955, 8970-72.
Cf. Fdgs., Par. 24(c).

[2] Id. (C) Tr. 8939-40, 8957-58.

[3] (C) Tr. 8886-87.

Q. Then don't you net more on the business at Victorville than you do at Los Angeles? A. That is theoretical. If there is any movement in carload lots we would, but there isn't any sold there in carloads.

Q. On such as you do sell, even though it is less than cars, isn't your mill net at Victorville greater than at Los Angeles? A. Yes, it would be.

Q. Do you have competitors selling cement into Victorville? A. Not that I know of. There isn't any business there to speak of.

Q. You have them coming into rather nearby points, I suppose? A. Well, really, the nearest thing of any consequence to Victorville is San Bernardino, where we all compete for business.

Q. Do you have a freight advantage into San Bernardino? A. No, we have not."[4]

2. Clark-Burns Data

Mill nets are a factor considered by Southwestern (Victorville) in deciding in what territory it will actively solicit business. As a general policy, it does not seek sales outside its customary market territory if they require greater freight absorption. Shipments to large jobs, such as Boulder Dam and Metropolitan Water District of Southern California, are exceptions.[1] A large proportion of the Shipments yielding lower mill nets to Southwestern (Victorville) are made to areas of heavy consumption, such as the City of San Diego, and for large projects such as the Boulder Canyon Dam project, as follows:

"Area around LA Harbor some times blanketed with Los Angeles proper because of retail competition although transportation cost to LA Harbor greater than to Los Angeles proper. Also prices in South San Joaquin Valley area are based at mills other

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[4] Id. (C) Tr. 8906-07.

[1] Com. Ex. 976-14 S.

than those in So. California proper. San Diego shipment prices forced down account northern California competition. Boulder Canyon Dam Shipments were also at lower nets, but on special contract."[2]

Southwestern (Victorville) has not actively solicited business in the territory in which delivered prices yield the lowest mill nets. It has confined its active solicitation markets where the best returns could be had.[3]

There is no market at Southwestern's (Victorville) mill. On rare occasions very small sales have been made directly to consumers at the mill but the quantity is negligible.[4] Southwestern has always been completely free to convert its Victorville mill into a basing point if it saw fit to do so. It is located in a sparsely settled portion of the Mojave Desert and there are other mills located closer to its marketing areas.[5]

Southwestern's (Victorville) mill nets have been affected by changes in the methods of transporting cement (see this Part XVII-C, "Trucking", pp. 2847-48 and "Water Delivery", pp. 2850-51, *supra*).

3. Other Evidence

The net mill value of Southwestern's (Victorville) sales for the years 1929, 1930, and 1931 is shown in its answer to the Commission's questionnaire. Commission's Counsel examined Southwestern's sales manager of the Victorville

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[2] Com. Ex. 976-14 U-V: Answer to Clark-Burns questionnaire. To the same effect Partridge (C) Tr. 8939, 8956.

[3] Com. Ex. 976-14 V.

[4] Com. Ex. 976-14 Q.

[5] Com. Ex. 976-14 Y.

plant as to its use of mill nets to determine whether its sales involved a profit or a loss.[1] Evidence offered on behalf of respondents as to the reasonableness and fairness of cement prices, and as to costs, profits and losses was rejected by the Trial Examiner.[2]

H. Diversions.

There is no evidence that Southwestern (Victorville) ever adopted or pursued any policy or practice or ever took any action with respect to diversions or, that it ever agreed to do so, and no evidence whatsoever relative to diversion of cement shipments in transit in any of its market territory.

I. Cement Institute.

In the spring of 1933 Southwestern became aware that a Code of Fair Competition for the cement industry was being formulated under the NRA and was advised that this work was being carried on through the Cement Institute and that members of the industry were joining for the purpose of taking part in the formulation of the Code. In order to protect any of its interests which might be affected by such a code, Southwestern's (Victorville) plant joined the Institute. Southwestern (Victorville) has never received statistical reports from The Cement Institute covering shipments or production in any of the territory in which it markets its cement but has received such information from the Bureau of Mines.[1]

During the existence of the NRA, the Victorville plant abided by the provisions of the Code because it understood that the terms of this Code were prescribed by law. Such

[1] Com. Ex. 3154; Tr. 8968.

[2] For citations see Part XVII-A, fn. 20, p. 2739.

[1] Merrill, Vice President, Southwestern (R) Tr. 47669-70.

compliance involved no major changes but some minor ones from practices which had been followed at that plant for some years prior to 1933.[2] Victorville has never regarded The Cement Institute as any agency for the interpretation or formulation of Victorville's policies.[3]

1. Attempted Organization of a Los Angeles Division of the Cement Institute

Early in August, 1936, Duque, as Trustee for District No. 11, wrote to Reiter, General Manager of the Cement Institute, stating that the four Southern California companies desired to establish a divisional office of the Cement Institute to be located in Los Angeles. His letter described the activities that were to constitute the function of the proposed division office as follows:

> "To promote the best interests of the cement industry by providing facilities for collecting, through voluntary action, information with respect to trade and commerce therein, and disseminating such information. The information so collected and disseminated, shall be as follows:
>
> (a) Information concerning credits.
>
> (b) Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement.
>
> (c) Information concerning production and stocks on hand of clinker and Portland Cement and shipments of Portland Cement, and cloth sack returns."

Duque's letter further stated that it was proposed to place James A. Keller in charge of the new office and that temporary arrangements have been made with Keller, commencing August 1, 1936, for conducting its activities until

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[2] Partridge, Sales Manager, Victorville (R) Tr. 47661.

[3] Id. (R) Tr. 47663.

such time as the establishment of a division office would be approved by the Board of Trustees of the Cement Institute.[1]

A letter from Keller to Reiter dated August 24, 1936, which has a letterhead "The Cement Institute, Southern California Division," reads in part:

> "I wired you Friday night for a limited supply of forms; the important forms are numbers 1 and 2. A small supply of number 1 was received today but none of number 2. I do not know whether I am making a proper request for these forms on the Chicago office or should we have them printed here locally?"[2]

Reiter replied to Keller on August 26, 1936, in part, as follows:

> "Inasmuch as it appears that present division offices of The Cement Institute will be discontinued it is probable that the Board will not accept your office as a division of The Institute and thus you may desire to delay printing of the stationery, forms, etc., until after the meeting of September 10."[3]

A meeting of the officers of the Southern California companies was held September 4, 1936 to consider the report of a committee to bring the matter to the attention of the Board of Trustees of the Cement Institute. It was the opinion of the members present that the Cement Institute should establish a local office on the Pacific Coast and inasmuch as a considerable portion of the work carried on by the Cement Institute, especially the statistical service and the distribution of freight rate information, was of no benefit to the Pacific Coast members, the acting Trustee was authorized to request a refund of dues to the Southern California members of at least 50%. The question of reporting of contracts was considered and it was decided that all

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[1] Com. Ex. 638 B-C, D.

[2] Com. Ex. 638 M.

[3] Com. Ex. 638 O.

contracts or orders secured for delivery beyond 15 days in District 11 territory should be filed. The matter of credit reporting was also referred to and it was decided that the data covering the status of over-due accounts should be distributed.[4] A letter dated September 11, 1936 from Partridge, Sales Manager of the Victorville plant to Blair, Sales Manager of the El Paso plant, states that Southwestern (Victorville) in reporting contracts booked by it would include orders taken in Arizona by its El Paso mill requiring delivery beyond the 15-day period.[5]

At a meeting of the Board of Trustees of the Cement Institute September 10, 1936, which was held to consider the report of the Committee on Future Activities,[6] a motion was made by Burnett, representing District #11, that the Board establish a branch office of the Institute in Los Angeles. The matter was left open to later consideration after discussion, which is reported in the minutes of the meeting as follows:

> "During discussion of the amendment Mr. Burnett stated that West Coast members considered statistical and freight rate service now being conducted valueless to them, whereupon Mr. Reiter explained that the costs of contract reporting and freight rate service were paid from special dues over and above general dues and that West Coast members did not pay for any part of the cost of such services which had been rendered in Districts 1 to 9 inclusive * * *"[7]

Examined on this subject by Commission's Counsel, Reiter testified that he had assumed that the Los Angeles

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[4] Com. Ex. 564-3 Y.

[5] Com. Ex. 1294 A; Tr. 8950.

[6] (For the report of the Committee on Future Activities and the action thereon by the Board of Trustees of the Cement Institute, see Part X, p. 1823, *supra*.)

[7] Com. Ex. 626 A-G.

office would be accepted by the Board of Trustees of the Cement Institute and in the interim gave them such information as he had on the activities and conduct of the other division offices, provided them with a supply of various forms which were used in the Chicago Division for contract reporting, and for a time put them on the mailing list for general letters of the Cement Institute such as other divisional offices received, excepting letters such as financial statements and minutes of meetings, which went only to trustees.[8] Reiter testified that the reason it was decided not to have the Southern California group constitute a division of the Cement Institute was that the Board of Trustees had decided to abolish other divisional offices and they felt it would be inconsistent to accept this office on the west coast. Keller was notified of the Board's decision not to accept the Southern California office as a branch or division of the Cement Institute, by letter dated September 22, 1936.[9]

J. Pacific Coast Cement Institute.

(*Foreword:* Error has been assigned to the action of the Commission in receiving any evidence on this subject or giving any consideration or weight to it in making its findings. This evidence was received over respondent's objection to it, generally, as incompetent, irrelevant and immaterial to any of the issues in the proceeding, and specifically, on the ground that the Pacific Coast Cement Institute is not in anywise involved in this proceeding, its activities have not been shown to have been connected with the respondent Cement Institute or with the conspiracy alleged in the pleadings, and the evidence relating to it does not prove or tend to prove any of the charges in the Complaint.)[1]

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[8] (C) Tr. 3301, 3304-05; Com. Ex. 638 G-K, L, O.

[9] (C) Tr. 3294, 3302; Com. Ex. 638-2 A.

[1] Tr. 8471-73, 9265.

There is no evidence that there was ever any connection between the Pacific Coast Cement Institute and the Cement Institute.[2] [In evidence is a letter dated September 29, 1936 from Keller, Secretary of the Pacific Coast Cement Institute, to Boyer, Traffic Manager of Southwestern, which relates to land grant rate information obtained by Keller from the Southern Pacific Railroad and which has a letterhead, "The Cement Institute, Southern California Division".][3] Asked if he was in anywise connected with the Cement Institute at that time, Keller testified as follows:

> "The Witness: No, sir; the Pacific Coast Cement Institute was incorporated on September 21, 1936, and I had some stationery on hand with the Cement Institute form, and our president authorized me to use it up on the freight quotations as it only went to the four Southern California members. In other words, this was a fictitious name, so far as we were concerned.
>
> Mr. Leisure: Will you tell the Examiner how you happened to have such stationery as that at all?
>
> The Witness: The Southern California Cement Manufacturers filed an application with the Cement Institute requesting them to open up a branch office in Southern California, and at a meeting of the trustees on September 10, 1936, the application was withdrawn for the reason as explained to us that the Cement Institute was abandoning all their branch offices, and it was then recommended and approved by the Southern California cement manufacturers that we would incorporate under the laws of the State of California a non-profit corporation to be called the Pacific Coast Cement Institute, and during the time from September 10th up to the latter part of September it was necessary to present the matter to our lawyers and they in turn had to draw up the articles of incorporation by-laws, and all the other things to make it legal, and these papers had to be sent to the Secretary of State at Sacramento, the commission of incorporation at Sacramento for

[2] Cf. Fdgs., Par. 8(o).

[3] Com. Ex. 564-3 R.

approval. That is about 420 miles from Los Angeles, and there was two or three weeks to require all these legal difficulties, or whatever you might call them, to be overcome so that we were a corporation within the spirit of the law of the State of California.

That is how the Pacific Coast Cement Institute happened to be formed, and, as I say, we had a few of these letter forms that we used up on freight quotations.

Mr. Leisure: So, as I understand your answer, on September 29, 1936, nor prior thereto, you had never been connected with the Cement Institute?

The Witness: We had never been connected with the Cement Institute, officially."[4]

[Keller was examined by counsel for the Commission concerning the affairs of the Pacific Coast Cement Institute. He testified that California, Monolith, Riverside and Southwestern were charter members of the Pacific Coast Cement Institute. The general offices were located in Los Angeles at that time. Superior Portland joined in December 1936, Pacific in June 1937, and Santa Cruz in September 1937. *Olympic* is a member. All companies west of the Sierra Nevada and Cascade Mountains are members now with the exception of *Cowell* and Northwestern Portland.[5] There has not been any Institute or any local group organi-

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[4] (C) Tr. 9174-76.
To the same effect, Id. (C) Tr. 9122.

[5] (C) Tr. 9150-51.
To the same effect, Gay, General Manager, Santa Cruz (C) Tr. 8612.
Tongue, Secretary, Superior Portland (C) Tr. 8382.
Cameron, General Manager, Olympic (C) Tr. 8524.
Knappenburger, Vice President, Oregon (C) Tr. 8470.
Hollister, President, Northwestern Portland (R) Tr. 48118 (Northwestern Portland was never a member).
Partridge, Sales Manager, Southwestern (Victorville) (C) Tr. 8946.

zation in California prior to the formation of the Pacific Coast Cement Institute.[6]

Duque, Vice President of California, became the first president of the Pacific Coast Cement Institute. The officers met as occasion demanded. The meetings have been for the purposes of organization, acting on applications for membership and amending the by-laws. The subject of Government bidding was not a topic of discussion at these meetings. Neither was the subject of land grant rates. Statistics were discussed, but this was not the purpose of any of the meetings.[7] In order to collect funds for the maintenance of the Pacific Coast Institute, its Board of Directors fixes the general fees at a tenth of a cent a barrel per month on the previous month's shipments.[8]

SERVICES RENDERED BY THE PACIFIC COAST INSTITUTE

Statistics.—The Bureau of Mines furnishes a monthly statement which Keller boils down and sends to members, covering shipments for a period of two or three years and for the month. The statement of the Bureau of Mines merely covers shipments for the previous month, whereas Keller analyzes the previous shipments and sends the members a comparison for the year and for the previous two or three years.[9]

Credit Reports.—The Pacific Coast Institute collects and disseminates credit information to the Southern California members. The auditor of each of the four companies files with the Institute on or about the 10th of each month

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[6] Gay, General Manager, Santa Cruz (C) Tr. 9147.

[7] Keller, Secretary, Pacific Coast Cement Inst. (C) Tr. 9178-80, 9239-30.
Com. Ex. 638 B-C, D: Correspondence between Duque and Cement Institute.

[8] Id. (C) Tr. 9159.

[9] Id. (C) Tr. 9144, 9163-66.

a statement of delinquent accounts showing the status of each account. The Institute consolidates the data and returns it to the four companies without any comment.[10]

Contract Reporting.—The four Southern California members report specific job contracts on all closed business to the Pacific Coast Cement Institute.[11] The contract itself is not filed. Merely a synopsis is filed, giving the name of the purchaser, the quantity of cement and the location of the job. The Institute does not have contract checkers to see whether or not deliveries have been made under the contracts which are filed with it.[12]

Keller was examined further as to how the contract reporting service of the Pacific Coast Cement Institute operates, as follows:

"*By Mr. Paulson*;

Q. Mr. Keller, what does your Institute do regarding contract checking? A. In our second service, which the local members at different sections may have the advantage of if they care to take advantage of it, the members file contracts of closed shipments and once a month the auditors, or the credit experts of the different companies, file a statement showing the delinquent accounts.

Q. Not being a cement man, I am not clear in my own mind just what all that means so I ask you to describe, if you will, from memory, one report received from, let us say, the Riverside Company. You can take one from random, out of your mind. A. Well, I might answer your question this way: That there might be a job for the construction of a highway, or a bridge or a power plant or a water diversion or a public building that the Riverside Company might secure, finally, the contract. When that con-

[10] Id. (C) Tr. 9171-72.

[11] A specific job is a job where cement is used for construction of some type and which calls for a specific quantity of cement for that specific purpose. Id. (C) Tr. 9220.

[12] Id. (C) Tr. 9220-21, 9226.

tract is received they file with us a statement showing the name of the purchaser, the location of the job, the description of the job, and the number of barrels of cement involved.

Q. Does the report include the price? A. No, no prices are reported.

Q. Do they make a separate report on each contract or do they make a monthly report for all contracts during the month? A. No, the contracts are reported as they are received.

Q. Is each contract reported individually? A. Individually.

Q. Do all members of the Institute cooperate with you in submitting those reports? A. The Southern California cement manufacturers make such reports. The other members, San Francisco, Portland, and Seattle, do not.

Q. What use do you make of those? A. We consolidate the reports as they are received in alphabetical station order, and we return them to the cement manufacturers giving the gist as I have just explained to you, without comment."[13]

Land Grant Rates.—Keller testified that upon request he has secured for the Southern California members of the Pacific Coast Institute land grant rates from various points of origin to various destinations. He secured land grant rates from the general offices of the Southern Pacific Railroad, or from the Santa Fe or the Union Pacific and passed them on to members without comment for what they were worth. Nothing was said in regard to obtaining land grant rates when he was hired.[14] Keller was questioned about this as follows:

"*By Mr. Paulson*:

Q. Wasn't that the main purpose of this Institute? A. No, sir.

Q. To begin with? A. Absolutely no."[15]

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[13] Id. (C) Tr. 9144-46.

[14] (C) Tr. 9179, 9181, 9189, 9234-36, 9238, 9243.

[15] (C) Tr. 9190.

Keller testified that he has received requests from the different Southern California companies for land grant rate information for government lettings. He had no contact with the government purchasing agencies and did not supply information in regard to projects. He merely forwarded the freight rates furnished by the railroads.[16] He has not had any conferences with the traffic managers of any of the Southern California companies and with the exception of Boyer of Southwestern, he does not know of any of them.[17]

The fact that Southern California members of the Pacific Coast Institute have at times requested Keller to obtain land grant rate information, the reasons therefor, and the independent use of such information by the company receiving it, are described in the testimony of Blair, Chief Clerk of California, which is summarized as follows:

> The Southern Pacific and the Atchison Topeka & Santa Fe are the only railroads over which California ships cement which have land grant freight rates, and for many years each of said roads has maintained the policy of furnishing to any cement company upon request a statement showing the land grant freight rates to any requested destination from each of the mills which can compete in selling cement for such destination. On various occasions when two or more companies have requested statements for the same destinations the railroads have expressed resentment over receiving repeated requests from several companies for the same information and have requested that a method be worked out whereby the information could be furnished on one request to all companies desiring it. After the organization of the Pacific Coast Cement Institute, Keller, its manager, suggested that he could perform this function, and late in 1936 the railroads

[16] (C) Tr. 9187-89.

[17] (C) Tr. 9182.

expressed a preference for reporting to Keller and avoiding the duplication of reports.[18]

In evidence is a file of the various land grant rate notifications issued by the Pacific Coast Institute to its Southern California members during the period December 18, 1936 to June 23, 1937,[19] for example, a memorandum dated February 15, 1937 from Keller to the Traffic Managers of the four Southern California companies, which reads as follows:

[Italicized part quoted in Fdgs. Par. Eight (o)]

"The Southern Pacific Company general offices at San Francisco advise, under their file number 2-S-12050-6702, that the following are the current commercial and approximate land-grant rates (in cents per 100 lbs.) on cement, minimum carload weight 60,000 pounds, to Elko, Nevada.

To Elko, Nevada

From		Commercial Rate	Land Grant Rate
Davenport	*Cal.*	*30½*	*29.756*
Redwood City	*"*	*30½*	*none*
Cowell	*"*	*30½*	*none*
Stockton	*"*	*30½*	*none*
Kentucky House	*"*	*30½*	*none*
Merced	*"*	*30½*	*none*
Devils Slide	*Utah*	*30½*	*none*
Monolith	*Cal.*	*47*	*43.268*
Victorville	*"*	*61*	*52.310*
Colton	*"*	*56*	*47.310*
Crestmore	*"*	*56*	*47.858*
Los Angeles	*"*	*56*	*48.532*
Long Beach	*"*	*59½*	*50.814*
Salt Lake City, Utah		*30½*	*none"*][20]

[18] (R) Tr. 42472-73.

[19] Com. Ex. 564-1 B-3 Z.

[20] Fdgs., Par. 8(o). Com. Ex. 564-1 Q.

None of the notifications as to land grant rates issued by the Secretary of the Pacific Coast Institute was sent to any respondent company with the exception of the four member companies in Southern California. There is no evidence relating to any interchange of land grant rates, special rates, or other freight rate information in any form by any of the respondent companies in Northern California or the Washington-Oregon territory. There is no evidence that any respondent company except the member companies in Southern California ever requested information on land grant rates from the Pacific Coast Institute as needed or at all.[21]

On August 14, 1936, in connection with a joint bid which the Southern California companies proposed to submit to the U. S. Bureau of Reclamation, California forwarded to Riverside a copy of a letter relating to the rates furnished by the Southern Pacific and Santa Fe railroads to the destination at which the cement involved in the joint bid was to be used. (For the evidence relating to Joint Bids, see this Part XVII-C, p. 2842). Other than this there is no evidence of any informal interchange of land grant rates among any of the respondent companies on the Pacific Coast at any time.[22]

GENERAL

There is no evidence that any respondent company except the member companies in Southern California ever participated in any of the activities of the Pacific Coast Cement Institute or ever furnished the Institute with any information other than information as to its monthly shipments as a basis for fixing dues. This was the same information which those companies furnished regularly to the

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[21] Com. Ex. 564-1 B-3 Z.
Cf. Fdgs., Par. 8(o).

[22] Cf. Fdgs., Par. 8(o).
Beckett, President, Riverside (R) Tr. 42884.
Com. Ex. 562-7 K, 7 L.

U. S. Bureau of Mines (Tr. 9159). There is testimony of executives of individual member companies of the Pacific Coast Institute as follows:

[Knappenburger, Vice President of Oregon:

"*By Mr. Wooden*:

Q. Does your company belong to the Pacific Coast Cement Institute? A. Yes.

Q. How long have you been connected there? A. I should say about two years.

Q. What are the functions of the Pacific Coast Cement Institute as you have found them? A. Insofar as we are concerned, we get a lot of literature and fresh clippings and one thing or another that we otherwise might not read.

Q. You pay out money for that? A. Oh, very small amount.

Q. Do you furnish the Institute on the Pacific Coast with information regarding some of your business affairs? A. Absolutely not, other than our shipments for a basis of assessing our dues.

Q. Do you get information on the same sort of thing back from the Institute in combining the figures for various mills? A. They are copied from the Bureau of Mines."[23]

SUPERIOR PORTLAND: Superior Portland furnishes the Pacific Coast Institute with information as to monthly shipments. The only thing it receives from the Pacific Coast Institute is tabulations of shipments similar to that issued by the Bureau of Mines. Superior Portland does not report any price information to the Pacific Coast Cement Institute. It has not reported or received any reports on contracts, and has never received any land grant rate compilation from the Pacific Coast Institute. Superior Portland obtains its land grant rate information from the railroads.[24]

[23] (C) Tr. 8470.

[24] (C) Tr. 8424-26; (R) Tr. 42895-96.

SANTA CRUZ: Santa Cruz has not received any information as to land grant rates or any freight rate service of any sort from the Pacific Coast Institute. It gets its land grant rates directly from the railroad companies.[25]

SOUTHWESTERN (VICTORVILLE): The only reports that Southwestern makes to the Pacific Coast Institute are a monthly report of contracts booked and a monthly credit report.[26] Southwestern has not supplied the Pacific Coast Institute with any land grant information. Southwestern has received from the Pacific Coast Institute land grant rates which were furnished by the carriers from time to time.[27]

RIVERSIDE:

> "Riverside did, from time to time, receive from the Pacific Coast Cement Institute information on land-grant freight rates, which latter information, however, Riverside made but little use of, preferring to obtain its data in this regard direct from the railroads themselves. At no time did the Pacific Coast Cement Institute have anything to do with the formulation or carrying out of Riverside's business or sales policies or practices."[28]

Keller was questioned about a memorandum entitled "Statement of various eastern and western cement mill base prices, as of 1/7/37" which shows base prices for cement mills in Oregon and Washington and at various eastern and middle western mills.[29] He testified that the data contained in this paper was compiled by him as a

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[25] Gay, General Manager, Santa Cruz (C) Tr. 8650, 8669.

[26] Partridge, Sales Manager, Southwestern (C) Tr. 8950-51.

[27] Id. (C) Tr. 8957.

[28] Beckett, President, Riverside (R) Tr. 42878.
To the same effect: Leonard, General Manager, Riverside (C) Tr. 9100-01.

[29] Com. Ex. 1213 A-B.

matter of information on the general trend of business conditions in the United States as related to cement and it was sent out to members of his organization wholly upon his own initiative and only on this one occasion. The information was gathered from various government and public sources, such as Federal Trade Commission publications (Sen. Doc. 71), current survey of the Department of Commerce, press releases, trade magazines such as Engineering News, Wall Street Journal, etc., and some of the information was obtained direct from companies as occasion demanded which was very rarely.[30]

Keller testified that the Pacific Coast Institute was in touch with all Washington bureaus. It was on the mailing list of the Comptroller-General, Interstate Commerce Commission, and other government agencies. As information came out pertaining to hearings, or increases or decreases on freight rates that might be of interest to the Southern California manufacturers it was passed on to them.][31]

K. Dealers and Manufacturer's Dealer Policies.

1. Importance of the Dealer

a. General

Pacific Coast companies find that dealers are their most important and reliable customers. They are careful, therefore, to maintain good relations with dealers and prospec-

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[30] (C) Tr. 9255-57, 9259-60, 9262-64.
See also Fdgs., Par. 9(e) and Part II C, pp. 227, 230, *supra*.

[31] Id. (C) Tr. 9250.

tive dealers.[1] Dealers perform many services for manufacturers, including retailing the product, assuming credit risk on small sales and promoting the use of cement.[2] Responsible executives of many of the Pacific Coast manufacturers testified that they were engaged in wholesaling cement and did not seek retail business.[3]

b. Relations With Dealer Associations

There is evidence that dealer groups try to exert pressure on manufacturers.[1] In evidence are a number of letters which manufacturers received from dealer associations.

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[1] Superior Portland: Tongue, Secretary (R) Tr. 42915.
Northwestern Portland: Hollister, President (R) Tr. 48119-20.
Calaveras (50%): Shelby, Vice President (R) Tr. 42852-53.
Southwestern: Merrill, Vice President (R) Tr. 47667.
Riverside: Beckett, President (C) Tr. 9026.
Yosemite: Holmes, former Vice President (C) Tr. 8762-64.
Com. Ex. 1198 E-G: Letters, 12/27/29 and 1/2/30, between Yosemite and Dealer Associations.
California: Blair, Chief Clerk (R) Tr. 42678-80, 42819-20.
Cf. Fdgs., Par. 17(a).

[2] Tongue, Secretary, Superior Portland (R) Tr. 42915.
Blair, Chief Clerk, California (R) Tr. 42819-20, 42485-86.
To the same effect:
McCracken, Dealer (R) Tr. 36708-30. Counsel for Commission *conceded* that if other dealers were called they would testify to the same effect, Tr. 36744.

[3] Beaver: Carpenter, former President (R) Tr. 47765.
Calaveras: Shelby, Vice President (R) Tr. 42852.
Pacific: Canvin, Secretary (R) Tr. 42838.
Santa Cruz: Gay, General Manager (R) Tr. 42862.
Superior Portland: Tongue, Secretary (R) Tr. 42901.
Yosemite: Van Slyke, Secretary (R) Tr. 42845.

[1] Blair, Chief Clerk, California (R) Tr. 42674-76, 42678-80.

Some manufacturers answered such communications. Individual manufacturers have occasionally attended dealer association meetings, at some of which other manufacturers were present.[2] The evidence is that most cement companies pay no attention to dealer associations although they try not to antagonize them. Some companies have a practice of not replying to dealer association letters.[3] There is testimony by responsible executives of Pacific Coast respondents denying that they ever entered into any agreements with dealer associations.[4]

c. Protection of the Dealer's Territory

There is no evidence of any agreement between any cement company on the Pacific Coast and any competitor or competitors to restrict sales to any given area. The only evidence concerning the policy of the cement manufacturer on the Pacific Coast as to whether he sells the dealer at every destination or only at destinations where he has a warehouse and is in a position to render the usual dealer service, is as follows:

Yosemite's policy is to decline to sell a dealer outside of his normal market area. This policy was adopted in order to promote harmonious relations with its dealer customers.[1]

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[2] Yosemite: Com. Ex. 1198 G.
Southwestern (Victorville): Com. Ex. 1205 Q.

[3] Superior Portland: Tongue, Secretary (R) Tr. 42901.
Yosemite: Holmes, former Vice President (C) Tr. 8742.
Calaveras: Holmes, Vice President (C) Tr. 8742.
California: Blair, Chief Clerk (R) Tr. 42674-76, 42677-80, 42788-89.

[4] California: Blair, Chief Clerk (R) Tr. 42788.
Monolith: Executive Officers (R) Tr. 48110.
Southwestern (Victorville): Partridge, Sales Manager (R) Tr. 47662.

[1] Holmes, former Vice President (C) Tr. 8742.

California has a general policy of confining sales to dealers within their local market areas, but it does allow such sales, each case being decided on its own merits.[2]

[In Southern California where Riverside established certain price zones, a dealer was allowed to purchase cement for delivery at any place within the zone in which he was located. These zones were established in 1929 "in an attempt to protect the suburban dealers from the activities of the city dealers."[4] Some of the price lists of Southwestern (Victorville), Riverside, California, Monolith, Santa Cruz, the first of which was issued on March 1, 1929, contain provisions which provide for the protection of the dealer. Some of the price lists of these companies doing business in Southern California provide that shipments

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[2] Blair, Chief Clerk (R) Tr. 42750-53.

[3] Com. Ex. 971-23 A-B, 24 E-G; Letters, 9/25/35 and 2/28/36, Leonard (Riverside) to Arthur R. Burns (Columbia University).

Leonard, General Manager, Riverside (C) Tr. 9068.

PRICE LIST

Date	Company	Destination	Ex. No.
3/ 1/29	Riverside*	So. Calif.	Com. Ex. 1205 H
7/29/29	Southwestern*	" "	Com. Ex. 1205 N
5/ 2/34	Southwestern‡	Ariz., So. Calif. & So. Nev.	Resp. Ex. 3750 A-F
11/ 1/34	Riverside‡	Ariz., Nev. & So. Calif.	Com. Ex. 1295 E
1/30/35	Southwestern‡	So. Calif., Ariz. & Nev.	Com. Ex. 1283
3/ 6/35	Riverside	Ariz., Nev. & So. Calif.	1295 L
5/28/35	Riverside†	So. Calif., Ariz. & So. Nev.	Com. Ex. 1295-2 D

(*) Dealer not having warehouse in town of destination sold at price 10c. per barrel higher than local dealer.

(†) Mark-up of 10c. on direct sales to dealers.

(‡) Shipments will be made to dealers only for shipments to community where his business is located.

will not be made to a purchaser (including dealer, jobber or distributor) outside his normal trade area.][5]

In metropolitan areas dealers are all sold at the same price. Superior Portland has always made direct sales to the city of Seattle and has sold to other cities on the same basis.[6]

There is no evidence on this subject with respect to a number of companies on the Pacific Coast.[7]

PRICE LIST

Date	Company	Destination	Ex. No.
[5] 12/14/34	Monolith	So. Calif.	2023 A-D
6/ 2/35	Southwestern	Cal., Ariz. & Nev.	1284
10/21/35	Santa Cruz	So. Cal., Ariz. & So. Nev.	1255
4/ 1/36	California*	So. Calif.	Com. Ex. 1309
11/ 6/36	Riverside	So. Cal., Ariz. & So. Nev.	1295-5 O-6 H
1/11/37	Santa Cruz	So. Cal., Ariz. & So. Nev.	1225

(*) Dealer not having warehouse in town of destination sold at price 10c. per barrel higher than local dealer.

[6] Tongue, Secretary, Superior Portland (C) Tr. 8388-89; (R) Tr. 42918.

Los Angeles—See zone price policies referred to, *supra*.

[7] *Cowell*
Pacific
Beaver
Lehigh (Metaline Falls).
Northwestern Portland
Superior Portland
Spokane
Oregon

2. Definition of a Dealer

There is no evidence of any understanding or agreement between any companies on the Pacific Coast to use an agreed definition of a dealer. There is evidence that some companies used the same definition of a dealer which originated in the NRA Cement Code.

There is no evidence of the existence of a definition of a dealer on the Pacific Coast prior to the [NRA Code Period,] and there is testimony by a responsible executive of a Pacific Coast company expressly denying the use of any such definition before that time, and testifying that each application to purchase cement was decided on its own facts. [The earliest definition appears in a number of price lists issued in early December 1933, when Article XI was in operation and it was substantially the same as the definition in Article XI. The NRA did not have very important effects on who was considered a dealer by cement companies on the Pacific Coast.[1]

During the Code period, at a meeting held to discuss Code matters an informal committee of Keller (Pacific) Newlands (Oregon) and Rea (Monolith) was appointed to present to the members for their criticism a form covering uniform terms and conditions of sale which it was proposed to incorporate in the price lists.[2] There is no evidence that any action was ever taken by this Committee or any of its members, and no evidence that this Commit-

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[1] Southwestern (Victorville): 12/12/33—So. Calif.,—Ariz. and Nev.—Resp. Ex. 3750 H.

Pacific: 1/2/34—No. and Cent. Calif., Nev.—Com. Ex. 954 K-M. Article XI (Com. Ex. 557).

California: Blair, Chief Clerk (R) Tr. 42674, 42676-77.

[2] Com. Ex. 954 I-J. Letter 12/29/33, Newlands and others to "Cement Manufacturers Located in Districts 11 and 12."

tee ever acted to recommend a definition of dealer to be incorporated in price lists.

The revision of Article XI of the Cement Code proposed by the California companies contained the same definition of a dealer that was contained in the original Article XI.[3]

In January, 1935, Southwestern (Victorville) announced a definition of a dealer in which there was no reference to the necessity of the dealer being engaged in the building material industry generally. This definition was adopted by several competitors.[4]

The testimony of executives of some of the cement companies on the Pacific Coast defined a dealer as a person carrying a general line of building materials including cement. These definitions do not differ in effect from those

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[3] Com. Ex. 645 H-M: Letter 3/19/34, Calaveras and other companies to Code Authority.
Cf. Com. Ex. 557, 645 I.

PRICE LIST

	Date	Company	Destination	Com. Ex.
[4]	1/30/35	Southwestern	Arizona, So. California & So. Nevada	1283
	1/30/35	Riverside	Arizona, So. California & So. Nevada	1295 B
	2/15/35	Santa Cruz	So. California, Arizona & So. Nevada	1266
	3/18/35) 3/19/35)	California	So. California, Arizona & So. Nevada	1305
	1/11/37	Santa Cruz	So. California, Arizona & So. Nevada	1225

contained in Article XI of the NRA Code or the contemporary company price lists.[5]

The practice of including a definition of a dealer in its price lists was discontinued by Riverside in January 1935 and by California in June 1935.[6] Santa Cruz and Southwestern (Victorville) have published price lists since the Code Period which included a dealer definition.[7]

a. Company Practice in Selling to Dealers

In August, 1929, Southwestern (Victorville) wrote to a dealers association indicating that its practice was to sell cement only through "recognized dealers."[1]

In December, 1929, Yosemite received a request for a quotation from the Farmers Cooperative Exchange of Santa Cruz, Calif. Yosemite declined to quote this firm as a dealer on the ground that it was already represented in the vicinity.[2] Yosemite called the matter to the attention of a local dealers' association and indicated that it would expect better representation in Santa Cruz and vicinity in the future. This letter states that Yosemite's local salesman

> "reports that he does not think it policy for us to sell the above-mentioned firm on account of our policy of cooperating with stock and account carrying resale dealers. * * * It is our intention at all times

[5] Santa Cruz: Gay, General Manager (R) Tr. 42862.
Pacific: Canvin, Secretary (R) Tr. 42838.
Calaveras: Shelby, Vice President (R) Tr. 42852-53.
Com. Ex. 557: Price lists cit., *supra*.

[6] Blair, Chief Clerk, California (R) Tr. 42673; Com. Exs. 1295 B, 1306.

[7] Price lists cit., *supra*.

[1] Com. Ex. 1205 Q.

[2] Com. Ex. 1198 E-F: Letter dated 12/27/29.

to cooperate to the fullest extent with established dealers, even though they are not representing us, feeling that such cooperation is best for our industry.'"[3]

In August, 1931, Beaver indicated that anyone who served the building material trade was a dealer.[4]

In October, 1931, Yosemite wrote to Riverside pointing out that it had recently opened up a new dealer outlet at Santa Barbara, California, and as a result other dealers at that point requested that Yosemite discontinue selling this dealer. Yosemite indicated that it would not sell to the new outlet if they were not "bona fide material dealers." Riverside was asked by Yosemite whether in its opinion this new company was a dealer.[5] There is no evidence that any opinion was expressed by Riverside or that there was any further correspondence or communication in the matter.

Northwestern Portland in one case refused to quote a certain dealer. The record shows that two other companies, Superior Portland and *Olympic*, did quote and sell to that dealer.[6] There is evidence that on occasion there has been a refusal to sell to a dealer because of poor credit risk,[7] and because a manufacturer was afraid it might antagonize another dealer customer.[8]

There is testimony by responsible executives of Pacific Coast companies denying that they had ever agreed to limit sales to persons meeting any set definition of a dealer or that the Institute ever had anything to do with who

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[3] Com. Ex. 1198 G: Letter dated 1/2/30.

[4] Com. Ex. 1207 I.: Letter, Beaver to Stearns & Chenoweth.

[5] Com. Ex. 1203-2 K-2 L.

[6] Phillips, Dealer (C) Tr. 8380.

[7] Holmes, Vice-President, Calaveras (C) Tr. 8742.

[8] Id., Tr. 8742, 8764; Com. Ex. 1198 E-G: Letters between Yosemite and dealer associations, 12/27/29 and 1/2/30.

should be sold as a dealer.[9] The evidence is that a person did not have to be a member of a dealer association to be sold as a dealer and manufacturers did not use the dealer association's definition of a dealer but sold each dealer on his own merits.[10] With respect to a number of Pacific Coast companies there is no evidence on this subject.[11]

3. Classification of Dealers Trade and Direct Sales

There is testimony that the policies of companies in the Southern California area with respect to the classification of dealers trade and direct sales developed over a long period of years, that it depends on custom and usage, and that there has been practically no change in the classes of work sold direct for the past 15 years, with the exception of emergency relief purchases.[1]

a. Dealer Discount

The evidence with respect to a dealer discount or differential on the Pacific Coast is as follows:

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[9] Oregon: (R) Tr. 48102-03 (adopting Tr. 26208, 37215-17).
California: Duque, Vice President (R) Tr. 42447-48.
Blair, Chief Clerk (R) Tr. 42674-80, 42788.
Monolith: Executive Officers (R) Tr. 48110.
Riverside: Beckett, President (R) Tr. 42878.
Southwestern (Victorville): Merrill, Vice President (R) Tr. 47667.
Blair, Sales Manager (R) Tr. 47662.

[10] Superior Portland: Tongue, Secretary (R) Tr. 42901.
California: Blair, Chief Clerk (R) Tr. 42674-76, 42677-80.

[11] *Cowell*
Spokane
Monolith
Lehigh (Metaline Falls)

[1] Blair, Chief Clerk, California (R) Tr. 42486-87.

In Arizona there was no trade discount in 1928 but consumers were quoted 25¢ up.[1]

In 1929 and 1930 Riverside sold consumers who were not entitled to buy direct at a price above the dealer's price. This was followed by Southwestern (Victorville) in 1930, 1931 and 1932.[2]

In 1929 Superior Portland had a 15¢ dealer discount.[3]

Tongue, Secretary and Sales Manager of Superior Portland testified:

> "Our discount terms have varied according to competitive conditions as we met them. For several years prior to the Code we allowed a 25-cent per barrel discount on our dealer business and 10 cents per barrel on contractors' business. For a number

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[1] Com. Ex. 1273 G-L: Memorandum 10/17/28, Partridge, Southwestern to Powell.

[2] Com. Ex. 1205 H: Riverside announcement.

PRICE LIST

Date	Company	Destination	Exh. No.
3/ 1/29	Riverside (a)	So. Calif.	Com. Ex. 1205 H
7/29/29	Southwestern (c)	So. Calif.	" " 1205 M
1/15/30	Riverside (b)	So. Calif.	" " 1983, 1203 O
7/10/31	Southwestern (d)	Ariz.	Resp. Ex. 3750 Q
1/ 5/32	Southwestern (d)	Ariz.	" " 3750 O

(a) Cement for paving work and for main line railroads sold *12c.* per bbl. higher.

(b) 10c. per bbl. higher to paving contractors for municipal paving and private subdivision work but not upon sales made to contractors doing government, state or county work.

(c) 26c. per bbl. higher.

(d) 25c. per bbl. higher.

[3] Com. Ex. 3714 C: Answer to F.T.C. questionnaire.

of years prior thereto we had allowed the same discount of 10 cents per barrel for cash in 10 days to both dealers and contractors. The 10-day discount period was in effect until the time of the Code when we extended it to 15 days to conform to the provisions of the Code. There are, however, exceptions. For example, we allowed one customer 2 percent for cash in 15 days on a single large order. Furthermore, we permit certain large customers to make bi-monthly payments and take cash discounts on a bi-monthly basis. Furthermore, when we learned in 1926 that a competitor had changed its discount period from 10 to 15 days we met its terms of discount where we competed with it for business, but on other sales we limited the discount period to 10 days. For a number of years past, down to the present time, information which we have obtained from our dealers indicates that Oregon and California companies with which we competed have had a discount of 10 cents per barrel for cash on the 10th day of the month following. On the other hand, while competing with them we have continued our practice of allowing only a 15-day period, whereas under the practices of such Oregon and California companies the customers have had much longer periods within which to take advantage of the discount."[4]

In May 1930, Yosemite increased its dealer discount from 10¢ per bbl. to 20¢ per bbl.[5]

In February, 1932 Pacific used a 20¢ dealer discount.[6] A dealer discount or dealer differential was in effect in northern California at the time of the consideration of the NRA Code in June 1933.[7] The policy of allowing dealers

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[4] (R) Tr. 42902-03; (C) Tr. 8458-59.

[5] Com. Ex. 3157 E: Answer to Commission's questionnaire (Yosemite).

[6] Com. Ex. 3166 G: Answer to Commission's questionnaire (Pacific).

[7] Com. Ex. 1230: Letter, dated June 22, 1933, Gay (Santa Cruz) to McCarthy (Pacific).

a differential on cement bought for resale was followed until the Code became effective.[8]

[Reiter, former Chairman of the Code Authority, was asked whether the terms of payment and the time within which discounts might be taken were the same throughout the country during the Code period, or whether it varied by districts. Reiter replied that they were the same for a period and then a company on the Pacific Coast filed different terms of cash discount, which was greater in amount, and that filing was met by its competitors on the West Coast.[9]

The revision of Article XI proposed by the Dealer Code Authority in March 1934 refers to the allowance of a trade discount.[10]

In March, 1934 Lehigh (Metaline Falls) stated that its method of quoting did not provide for a trade discount.][11]

In November, 1935 Santa Cruz allowed consumers at 20¢ commission which could be deducted by dealers or others entitled to buy direct at dealers' prices. Some

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[8] Com. Ex. 1219: Santa Cruz price list, No. & Central Calif. & Nev., Nov. 1, 1933.

Com. Ex. 1220: Santa Cruz price list, No. & Central Calif. & Nev., Jan. 2, 1934.

Com. Ex. 954-1 K: Pacific price list, No. & Central Calif. & Nev., dated Dec. 27, 1933.

Com. Ex. 427 K: Letter, Code Authority to Pacific Coast companies, dated Apr. 5, 1934, re prices, terms and conditions filed by member companies.

[9] (C) Tr. 4007.

[10] Com. Ex. 645 F.

[11] Com. Ex. 645 B: Letter 3/30/34, Perrow, Lehigh to Lucas, Superior Portland.

competitors selling in northern California, Oregon and northern Nevada followed this practice.[12]

Santa Cruz continued to allow a dealer discount until the enactment of the Robinson-Patman Act (June 19/36).[13] There is no evidence of any respondent company on the Pacific Coast quoting a consumer subject to a dealer's allowance after that date.

Keller (Pacific) wrote to Condon (Hawkeye) concerning the dealer differential and discounts in the east and Condon replied under date of February 9, 1931, outlining the varying marketing practices in the East including the Lehigh Dealer Service Plan, and stating that "the situation in the Middle West is decidedly lacking in uniform practice."[14] In April 1931 Young of Lehigh wrote to Keller about the suspension (on March 16, 1931) of its so-called Lehigh Plan and enclosed a copy of Lehigh's announcement to the trade.[15]

There is no evidence that any special announcements of sales policy were made by any company on the Pacific Coast in 1931 and no evidence that the Lehigh Dealer

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PRICE LIST

	Date	Company	Destination	Com. Ex.
[12]	11/ 1/35	Santa Cruz	No. Calif. & Nevada	1254
	1/ 8/36	Monolith	San Joaquin Valley	2033
	2/ 1/36	Santa Cruz	Oregon	1216
	2/19/36	Monolith	Oregon	2096 B
	4/21/36	Monolith	No. & Cent. Calif. & No. Nevada	2048

[13] Gay, General Manager (C) Tr. 8638-39.

[14] Com. Ex. 2228: Letter 2/7/31, Keller, Pacific to Condon, Hawkeye,
Com. Ex. 2229 A-B: Unsigned letter, 2/9/31, to Keller, Pacific.

[15] Com. Ex. 1194 A, B: Letter 4/30/31, Young to Keller, Pacific.

Service Plan was ever in effect anywhere on the Pacific Coast. There is no evidence that Lehigh's plant at Metaline Falls, Washington, ever adopted or used this Plan.

b. Direct Sales to Others Than Dealers

There is evidence that some Pacific Coast companies have always sold direct to dealers, United States Government, the State of California, and counties and municipalities on large projects. Highway contractors have been sold direct since 1920. Before 1920 the State always bought the cement. Large concrete products plants that did not require dealer service have always been sold direct.[1]

Some of the Pacific Coast companies make direct sales to any of the following classes of trades:

Dealers
United States Government and State Governments
Railroads and railroad contractors
Contractors doing paving or bridge work for the United States and State Governments
Owners or contractors purchasing for major water development
Flood control projects and irrigation districts
Manufacturers of cement and concrete projects and commercial concrete mixing plants.[2]

Northwestern Portland has never published a classification of customers. As a matter of practice it reserves to itself the right to sell direct or through a dealer on any type of work and each sale is decided on its own facts.

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[1] Blair, Chief Clerk, California (R) Tr. 42486-87.

[2] Beaver: Carpenter, former President (R) Tr. 47764-65.
Calaveras: Shelby, Vice President (R) Tr. 42852.
Pacific: Canvin, Secretary (R) Tr. 42838.
Santa Cruz: Gay, General Manager (R) Tr. 42862.

Under these circumstances direct sales have been made to United States and agencies, States and agencies, Counties, Municipalities, School Districts, Highway Contractors, General Contractors, Railroads, Public Utilities, Concrete products manufacturers, Ready-mix plants, Mining companies, and Dealers.[3]

In response to a request of the Department of Highways of Nevada, for bids f.o.b. Tonopah, Nevada on 400 barrels of standard cement, opened December 17, 1935, Santa Cruz quoted its current list price, subject to the usual allowance of 20¢ per barrel to consumers entitled to buy direct at the dealers' price.[4] In reply to a protest from the Highway Department, Santa Cruz wrote on December 30, 1935 as follows:

[Italicized part quoted in Fdgs. Par. Six (b)]

> *"The prices which we quoted are our regular established prices under the classification of State Highway Departments. It is expected that prices would be uniform, otherwise the company quoting the lowest price would receive all the business and the other companies would be left without any."*[5]

Gay, General Manager of Santa Cruz, testified that ordinarily, his company's prices to states and subdivisions of states, other than emergency relief agencies, are the same as its prices to dealers except on large projects where the company knows from past experience that it is neces-

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[3] Hollister, President (R) Tr. 48115, 48122-23.
Resp. Ex. 3789: Sample quotation of Northwestern, 10/19/35.

[4] Com. Ex. 1254: Santa Cruz price list for Northern Nevada, effective November 1, 1935.
Com. Ex. 2049 H: Monolith price list.

[5] Fdgs., Par. 6(b); Com. Ex. 1212 A-B.
Gay, General Manager, Santa Cruz (C) Tr. 8640.

sary to meet a lower price that a competitor may have quoted.[6]

c. Article XI of NRA Cement Code

[There is evidence that manufacturers on the Pacific Coast participated in the drafting and approval of Article XI of the NRA Cement Code. A meeting of the cement manufacturers of Northern California was held concerning the NRA Code on June 20, 1933.[1] Subsequently Shelby (Calaveras) wired Koch (Lone Star) that the proposed Code apparently required that "cement be sold at the same price to both dealers and consumers which would eliminate dealers entirely, and asked, "Is that your interpretation?" Lone Star replied that its interpretation of the proposed Code was that it did not change Lone Star's existing selling policy which reserved the right to make direct sales to certain classes of trade.[2] A memorandum of the meeting of June 20, 1933, *supra*, was prepared to be sent to Henderson (a member of the Code liaison committee) suggesting certain changes in the Code, among others the establishment of a Pacific Coast Regional Committee to handle matters pertaining to Article XI and the inclusion of a provision that public utilities be sold on the same basis as contractors.[3]

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[6] (C) Tr. 8638.

[1] Com. Ex. 1228; Gay, General Manager, Santa Cruz (C) Tr. 8662-63.
The companies were Pacific, Santa Cruz, Calaveras, Yosemite, and *Cowell*.

[2] Com. Ex. 585 Q, S, T, U.

[3] Com. Exs. 1227-1230: Correspondence and memorandum of conference, June 20, 1933.

Following the enactment of the NRA Code an informal committee was appointed to prepare terms and conditions of sale which it was proposed to incorporate in the price lists.[4] Article XI was still in effect at this time and very little was left to be determined by the committee. On January 24th, 1934 Union asked this committee for an interpretation in connection with Article XI of the Code. The record does not disclose that any action was taken by the committee in response to this request. In July, 1934 Union inquired of Keller whether under the Code sales were made direct to industrials in California. Keller's reply referred Union to Article XI, pointing out that proposed changes in the Code were then pending with the Administrator in Washington.[5] There is no further evidence with respect to this Committee.

During the period when Article XI was in effect companies on the Pacific Coast submitted a number of problems to the Code Authority for determination, including the question of whether CWA sales were to be sold direct or through dealers. The Code Authority ruled that Article XI provided that this type of business was to be sold direct.[6] District 12 (Oregon, Washington) asked to have an exception to Article XI granted, but the Code Authority took no action since Article XI was suspended.[7]

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[4] Com. Ex. 954 I-J: Letter 12/29/33, Newlands and others to "Cement Manufacturers Located in Districts 11 and 12."

[5] Com. Ex. 954-1 U: Letter 1/24/34, Gibson, Sales Manager, Union to Keller, Vice President, Pacific.
Com. Ex. 736 A-C: Letters 7/2/34, 7/17/34, between Gibson, *supra*, and Keller, *supra*.

[6] Resp. Ex. 3183 C-D, E, H: Correspondence, January 1934, between Code Authority and Riverside, Yosemite, Superior Portland.
Com. Ex. 1019 B: Letter 12/22/33, Rader, Chairman, Code Authority, "To All Members of the Industry."

[7] Resp. Ex. 3183 H, cited, *supra*.

Following the suspension of Article XI, Beaver on February 11, 1934, announced a classification of types of business which in the main followed the provisions of the NRA Cement Code.[8] In March, 1934, California companies submitted to the Code Authority a proposed revision of Article XI which they asked be made applicable to District #11 (California, Arizona, and Nevada). This proposal provided:

> "Except as otherwise specified, the following buyers shall be sold direct by members of the industry at the same price and under the same terms and conditions of sale as to dealers:
>
> United States Government, all departments except C.W.A. projects located in whole or in part within cities, towns or villages, which shall be sold through recognized dealers for fifteen (15) days delivery.
>
> State Governments.
>
> Contractors doing paving or bridge work for the United States Government or State Governments.
>
> Railroads filing tariffs with State or Interstate Commissions.
>
> Owners or contractors buying for power development, flood control and water supply projects.
>
> Concrete products manufacturers for their own manufacturing operations but not for resale."[9]

In the meantime the Code Authority for the Builders Supply Industry had suggested a method of selling and

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[8] Com. Ex. 427-2 B, 2 C.

[9] Com. Ex. 645 H-M: Calaveras, California, *Cowell*, Monolith, Pacific, Riverside, Santa Cruz, Southwestern (Victorville), Yosemite.

marketing cement and copies of this plan were sent to manufacturers by the Trustee for District 12.[10] Some manufacturers sent in comments on this proposed Code.[11] Some manufacturers felt that counties (and contractors working for counties) should be sold direct on paving jobs outside cities.[12] One company thought counties and cities should be sold direct on paving jobs regardless of the location of the work.[13] Some companies thought ready-mix companies should be sold direct.[14] One company favored selling railroads direct except possibly on sales within cities or towns.[15] The proposal of the dealers Code Authority provided that CWA sales would be made only through dealers whereas the manufacturers proposed that more sales should be made direct.[16] There is no evidence that any action was ever taken as a result of the proposal of the Dealer Code Authority.]

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[10] Com. Ex. 645 E-F.

[11] Com. Ex. 645 D, G—Santa Cruz.
Com. Ex. 645 C—Olympic.
Com. Ex. 645 A—Spokane.
Com. Ex. 645 B—Lehigh (Metaline Falls, Wash.).

[12] Com. Ex. 645 C—Olympic.
Com. Ex. 645 A—Spokane.
Com. Ex. 645 B—Lehigh.

[13] Com. Ex. 645 B—Lehigh.
See also Spokane—Com. Ex. 645 A.

[14] Com. Ex. 645 B—Lehigh.
Com. Ex. 645 A—Spokane.

[15] Com. Ex. 645 C—*Olympic*.

[16] Com. Ex. 645 B, C, E-F.

d. Price Lists.

Some companies testified that price lists contain the only classification of customers that they have ever issued.[1] During the [NRA Code period] and thereafter it was the practice of some companies on the Pacific Coast to mail price lists to competitors and these lists contained such matters as dealer definition and classification of business.[2] During the [Code Period] Monolith suggested that the Code Authority require competitors to exchange price lists and the Code Authority replied that it had no power to do so.[3]

Most of the companies on the Pacific Coast that published any price lists did not do so until the [NRA Cement Code] became effective, for example, Southwestern (Victorville), Oregon, Calaveras, and Yosemite.[4] Some companies who issued price lists mailed them to competitors only during [NRA Code Period,] for example, Southwestern has not received any price list from Santa Cruz, Riverside or Monolith since the NRA Code. Since the Code Period the practice has been eliminated.[5] The evi-

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[1] California: Blair, Chief Clerk (R) Tr. 42486-87.
Calaveras: Shelby, Vice President (C) Tr. 8696.

[2] Riverside to Yosemite, Com. Ex. 1203 D, R.
Riverside to Pacific, Com. Ex. 1203 Q; Gay, General Manager, Santa Cruz (C) Tr. 8635.
Riverside to Cowell, Com. Ex. 1203 H; Beckett, President, Riverside (C) Tr. 9006.
Com. Ex. 1203-2 F-2 G.

[3] Com. Ex. 984 D (quoted *supra*, Part XVII-A, p. 2707).

[4] Partridge, Sales Manager, Southwestern (C) Tr. 8894-96.
Knappenburger, Vice President, Oregon (C) Tr. 8473-74.
Shelby, Vice President, Calaveras (C) Tr. 8692-93.
Holmes, Vice President, Calaveras (C) Tr. 8737-38.

[5] Partridge, Sales Manager, Southwestern (C) Tr. 8895-96.
Knappenburger, Vice President, Oregon (C) Tr. 8474.
Blair, Chief Clerk, California (R) Tr. 42546-48.

dence is that manufacturers secure such price lists from the dealer trade and that as a result manufacturers have from time to time sent price lists to competitors as a matter of courtesy.[6] Superior Portland denied that it ever sent out or received any price lists. Several other Pacific Coast companies never issued or sent any price lists to competitors.[7] Superior Portland has a typewritten price list for its own use only. None of the companies in Washington issue price lists.[8] Oregon, Pacific, Yosemite, and California have not issued price lists since the NRA Code Period.[9] Calaveras has only published lists on two or three occasions and Yosemite very infrequently.[10] Monolith cancelled all of its price lists effective December 14, 1936 and announced that "Future quotations and sales will be based upon specific sales contracts with the contractor and dealer, covering specific jobs and requirements.[11]

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[6] Holmes, *supra*, Tr. 8736.
George, General Manager, Cowell (C) Tr. 8785-86.

[7] Tongue, Secretary, Superior Portland (C) Tr. 8435-36, 8445-46.
Northwestern Portland.
Spokane.
Lehigh (Metaline Falls).

[8] Tongue, Secretary, Superior Portland (C) Tr. 8395, 8397.

[9] California: Duque, Vice President (C) Tr. 9323.
Oregon: Knappenburger, Vice President (C) Tr. 8474.
Gay, General Manager, Santa Cruz (C) Tr. 8635.

[10] Shelby, *supra*, Tr. 8692-93; Holmes, *supra*, Tr. 8736-37.

[11] Resp. Exs. 3008-3010: Monolith notices to dealers 12/14/36, 1/31/37, 2/18/37.

Southwestern (Victorville) withdrew its price lists and supplements thereto on November 25, 1938."[12]

Some Pacific Coast Companies never had a formal classification of trade but decided each application on its own merits.[13]

There is testimony by the responsible executives of companies on the Pacific Coast denying that they ever entered into any agreement with any competitor or competitors to classify customers and denying that the Cement Institute ever interpreted or influenced their sales policies.[14]

4. Survey of Announcements

a. Emergency Relief Purchases (WPA)

[During the time Article XI was in effect the Code Authority issued interpretations with respect to sales for use on Emergency Relief work.[1] On January 2, 1934, District

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[12] Resp. Ex. 3739: Letter 11/25/38, Partridge, Sales Manager, Southwestern to dealers.

[13] Northwestern Portland: Hollister, President (R) Tr. 48119-20, 48115; Resp. Ex. 3789.
Superior Portland: Tongue, Secretary (R) Tr. 42900.

[14] Calaveras: Shelby, Vice President (R) Tr. 42853.
Monolith: Executive Officers (R) Tr. 48110.
Northwestern Portland: Hollister, President (R) Tr. 48116, 48118-19.
Southwestern (Victorville): Partridge, Sales Manager (R) Tr. 47661-63.
Riverside: Beckett, President (R) Tr. 42878.
California: Duque, Vice President (R) Tr. 42447-48.
Oregon: (R) Tr. 43102 (adopting Tr. 26136-37, 37215, 37607).

[1] Resp. Ex. 3183 E; Com. Ex. 1019 B.

#12 (Washington-Oregon) asked for an exception to Article XI. The Code Authority replied on January 29 that Article XI had been suspended and while the suspension was in effect a member's method of selling as to direct sales or sales through dealers was not regulated.[2]

After the suspension of Article XI, the California companies proposed a substitute which provided that CWA projects located in whole or in part within cities, towns or villages would be sold through dealers.[3] The Code Authority of the Builders Supply Industry on the Pacific Coast proposed that CWA projects located in whole or in part within a city, town, or village, PWA projects and other Government relief agency projects located principally within a city, town, or village, should not be sold direct.[4] In the meantime Beaver had announced a policy on or before February 11, 1934 which provided that all purchases by the U. S. Government should be sold direct.[5]

On May 2, 1934, Southwestern (Victorville) announced the policy that "localized unemployment relief projects * * * located wholly or in part within cities, towns or villages" would be sold through dealers.[6]

On December 21, 1934 Monolith announced an exception to direct sales to the U. S. Government, which provided for sales to "the U. S. Government and State Governments except that cement for work of Federal Relief Agencies located within cities, towns or villages shall be sold through

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[2] Resp. Ex. 3183 H.

[3] Com. Ex. 645 H-M.

[4] Com. Ex. 645 E-F.

[5] Com. Ex. 427-2 B-2 C.

[6] Resp. Ex. 3750 A-F: Southwestern price list, dated 5/2/34, So. Cal., Ariz. & Nevada.

dealers." This was followed by a number of competitors.[7]]

On April 1, 1936 Southwestern (Victorville) adopted a provision that the U. S. government would be sold direct "excepting local relief agencies thereof at our option". Subsequent Southwestern price lists omitted this provision.[8]

Executives of companies on the Pacific Coast testified that they considered WPA business as the type of work which normally would be sold through dealers and which often needed dealer service. For that reason some manufacturers did not bid on WPA business.[9] Most manufac-

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PRICE LIST

Company	Date	Destination	Com. Ex.
[7] Monolith	12/21/34	So. Calif., Ariz. & So. Nev.	2021
Riverside	1/30/35	So. Calif., Ariz. & Nev.	1295 B
Southwestern (Victorville)	1/30/35	So. Calif., Ariz. & Nev.	1283
Santa Cruz	2/15/35	No. Calif. & Nev.	1265
Santa Cruz	2/15/35	So. Calif., Ariz. & So. Nev.	1266
Santa Cruz	3/ 1/35	Oregon	1265
California	3/18/35	So. Calif., Ariz. & So. Nev.	1305
Santa Cruz	5/30/35	No. Calif. & Nev.	1259
California	6/ 2/35	So. Calif., Ariz. & Nev.	1306
"	6/ 2/35	So. Calif., Ariz. & So. Nev.	1305
Riverside	6/2-10/35	So. Calif., Ariz. & So. Nev.	1295-2 Q-3 E

[8] Com. Exs. 1286, 1280 F, G: Southwestern's Price Lists 4/1/36, 1/24/38 for So. California.

[9] Superior Portland: Tongue, Secretary (R) Tr. 43902.
Northwestern Portland: Hollister, President (R) Tr. 48120.
California: Blair, Chief Clerk (R) Tr. 42680-92.

turers have made some sales direct to the WPA.[10] Manufacturers on the Pacific Coast bid on the "Good Friday" invitation and similar invitations of the Procurement Division.[11] California has sold dealers f.o.b. mill in order that they might quote mill prices on WPA projects.[12] Santa Cruz' policy was to sell WPA work through dealers.[13]

The current sales policies of companies on the Pacific Coast contain no provision that WPA should be sold through dealers.[14] Manufacturers denied that they attended any dealers' meetings on this subject or that they ever had any agreement with any competitor with respect to Emergency Relief purchases or the classification of trade.[15]

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[10] California, since June 1935: Blair, *supra*, Tr. 42684-92, 42764-66, 43792.
Resp. Ex. 3442.
Riverside: 1936-40 (Treasury Dept.), Resp. Ex. 3450 (71 instances).
5/10/38 (Treasury Dept.), Resp. Ex. 3455.

[11] California: Resp. Ex. 3442, Blair, *supra*, Tr. 42484-85.
Southwestern: Resp. Exs. 3721 A-G, 3722-3726.

[12] Blair, *supra*, Tr. 42827.

[13] Gay, General Manager (C) Tr. 8637.

[14] Riverside: Beckett, President (C) Tr. 9026.
California: Blair, Chief Clerk (R) Tr. 42486-87.
Beaver: Carpenter, former President (R) Tr. 47764-65.
Calaveras: Shelby, Vice President (R) Tr. 42852.
Northwestern: Hollister, President (R) Tr. 48115.
Pacific: Canvin, Secretary (R) Tr. 42838.
Santa Cruz: Gay, General Manager (R) Tr. 42862.

[15] California: Blair, *supra*, Tr. 42786-87, 42692-94, 42689-90.
Calaveras: Shelby, *supra*, Tr. 42853.
Monolith: Executive Officers (R) Tr. 48110.
Northwestern Portland: Hollister, *supra*, Tr. 48116, 48118-19.
Southwestern (Victorville): Partridge, Sales Manager (R) Tr. 47862.
Oregon: (R) Tr. 48102-03 (adopting 37607).

b. Dealer's Resale Prices

[There is evidence relating to the efforts of some Pacific Coast companies to establish or maintain a mark-up for dealer sales in accordance with the Fair Trade Law of California. In an announcement of October 22, 1927, Riverside suggested to its dealers a minimum resale price within the boundary of certain zones in the Los Angeles metropolitan area.[1] Two of Riverside's competitors individually indicated they were in sympathy with the efforts of dealers to maintain resale prices.[2]

In July 1929 resale prices in Southern California broke down due to demoralization of the cement market. On January 15, 1930, Riverside attempted to fix a minimum resale price for cement in Southern California by establishing dealer minimum resale prices of cement for each zone. This policy was still in effect on September 25, 1935.[3] From time to time the dealer customers of Riverside suggested revisions in the zones and zone prices in Southern California.[4] On sales direct to the Government dealers did not get a commission on the mark-up under Riverside's plan.[5]

A minimum retail price mark-up of 20¢ per barrel over the dealers' cost was announced by Southwestern (Victor-

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[1] Com. Exs. 971-23 A-B, 1975 A-B, 1976, 1205 H: Provided for 26c. and 38c. mark-ups.

[2] Com. Ex. 1205 Q: Southwestern (Victorville): Letter dated Aug. 30, 1929 to Dealers Association.
Com. Ex. 1203-2 K-2 L: Yosemite: Letter dated Oct. 22, 1931 to Riverside.

[3] Com. Exs. 971-23 A-B, 1297, 1981 A-B, 1982, 1983, 1203 H, 1977 A-C, 1979.
In July 1930 the resale price was fixed at 30c. per barrel.

[4] Com. Ex. 1203 T.

[5] Com. Ex. 971-23 A-B.

ville) on October 29, 1935.[6] In November, 1938, Southwestern discontinued its resale contracts.[7]

A number of the price lists of Southern California companies contained provisions relating to resale prices.[8] In 1938 Southwestern cancelled these provisions of its price lists.[9]]

There is no evidence of any attempt to fix resale prices in any other part of the Pacific Coast.

c. Sales on U. S. Government Projects

The United States Government was always able to buy cement direct, until the controversy arose with the Code Authority of the Builders Supply Industry over Emergency Relief purchases during the [Code Period.] The earliest evidence is a price list of Riverside issued March 1, 1929.[1] Many other price lists provided for direct sales to the United States Government, but after 1934 sales for Emergency Relief work were sometimes excluded.[2]

Manufacturers sometimes do not bid direct when U. S. Government buys in less than carload quantities or asks for

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[6] Com. Ex. 1282 C; Notice to dealers, dated 11/26/35 for California, Arizona and Nevada.

[7] Resp. Ex. 3739: Letter to dealers, dated 11/25/38.

PRICE LIST

Date	Company	Destination	Com. Ex.
[8] 3/ 1/29	Riverside	So. Calif.	1205 H
1/15/30	"	"	1203 O
4/ 1/36	Southwestern	"	1286
4/ 1/36	California	"	1309 A

[9] Com. Ex. 1280 E.

[1] Blair, Chief Clerk, California (R) Tr. 42486-87, 42680-82. Com. Exs. 1205 H, 562-7 S-7 T.

[2] Price Lists, cit., *infra*.

dealer service. The same applies to the Los Angeles Department of Water & Power.[3]

Since the NRA Code Period, contractors have always been sold direct on cement for use on Government projects involving paving and bridge work, with the exception that where the work was located entirely within cities, towns or villages, it was sold through dealers except for a period of about a year following the suspension of [Article XI of the Code.[4]]

Executives of a number of the Pacific Coast companies testified that it is their current practice to sell direct on bridge or paving work.[5] Northwestern Portland reserves the right to sell direct to highway contractors.[6]

d. Sales on State Projects

Direct sales have always been made to State Governments as shown by the price lists, although from time to time certain limitations were included.[1]

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[3] Monolith: Com. Ex. 3262 H.
California: Com. Ex. 3262 H, F-G, I-J.
Nicklin, Purchasing Agent, Los Angeles Dept. of Water & Power (C) Tr. 9297-98.
Com. Exs. 1300-1301.

[4] Price lists, cit., *infra*.

[5] Beaver: Tr. 47764-65.
Calaveras: Tr. 42852.
Pacific: Tr. 42838.
Santa Cruz: Tr. 42862.

[6] Tr. 48115, 48122-23; Resp. Ex. 3789.

[1] Tr. 42486.

PRICE LIST

Date	Company	Destination	Com. Ex.
3/ 1/29	Riverside	So. Calif.	1205 H
7/29/29	Southwestern*	So. Calif.	1205 M
7/10/31	Southwestern†	Arizona	Resp. Ex. 3750 Q

In Southern California highway contractors have been sold direct since the 1920's. In other sections of the Coast, although manufacturers sold the various states direct for

Date	Company	Destination	Com. Ex.
12/12/33	Southwestern‡	Ariz., Nev. & So. Calif.	Resp. Ex. 3750 H
1/ 2/34	Pacific‡	No. & Cent. Calif. & Nev.	954 K-M
2/17/34	Beaver (quot.)‡	Oregon & Calif.	427 BB, CC
5/22/34	Southwestern**	Ariz., Nev. & So. Calif.	Resp. Ex. 3750 A-F
12/21/34	Monolith***	So. Calif., Ariz., So. Nev. & So. Utah	2021
1/30/35	Southwestern***	Ariz., So. Calif. & Nev.	1283
1/30/35	Riverside***	Ariz., Nev. & Calif.	1295 B
2/15/35	Santa Cruz***	No. Calif. & Nev.	1265
3/18/35	California***	So. Calif.	1305
6/10/35	Riverside***	So. Calif., Ariz. & So. Nev.	1295-3 Q-3 E
7/ 4/35	Santa Cruz***	No. Calif. & Nev.	1258
10/23/35	Southwestern	Ariz., So. Calif. & Nev.	1285 N
1/10/36	Calaveras***	No. Calif. & Nev.	1268
4/ 1/36	California	So. Calif.	1309
4/ 1/36	Southwestern****	So. Calif.	1286
4/10/36	Monolith	So. Calif.	1989
1/11/37	Santa Cruz***	No. Calif. & Nev.	1222

* All departments.

† State of Arizona and highway contractors.

‡ When properly authorized to purchase.

** Except localized unemployment relief projects similar to the Civil Works Administration located wholly or in part within cities, towns or villages.

*** Except work of Federal Relief Agencies located within cities, towns or villages.

**** Except local relief agencies thereof at our option.

Northwestern reserves the right to sell to states direct. Tr. 48115, 48122-23. Resp. Ex. 3789.

paving and bridge work, it was not until Article XI of the Code became effective that manufacturers generally sold direct to contractors doing paving or bridge work for various states. This practice has continued since December 1933. In some of the price lists there is a limitation to the effect that direct sales will be made to contractors on such projects except where the work is located entirely within cities, towns or villages. In a few instances during the Code Period some companies in Southern California limited direct sales to contractors doing paving jobs only.[2]

c. Sales on County and Municipal Projects

Southern California counties (and large municipalities) have always purchased direct from many cement companies. The earliest price lists provided for sales direct to counties.[1] During the [Code Period] such provisions were

[2] Tr. 42486-87.

PRICE LIST

Date	Company	Destination	Com. Ex.
12/12/33	Southwestern†	Ariz., Nev. & So. Calif.	Resp. Ex. 3750 H
1/ 2/34	Pacific†	No. & Cent. Calif. & Nev.	954 K-M
2/17/34	Beaver†	Ore. & No. Calif.	427-2 B, 2 C
12/21/34	Monolith	So. Calif., Ariz., So. Nev. & So. Utah	2031
1/30/35	Riverside	Ariz., So. Calif. & Nev.	1295 B
1/30/35	Southwestern	Ariz., So. Calif. & Nev.	1283
2/15/35	Santa Cruz	No. Calif. & Nev.	1365
3/18/35	California	So. Calif., Ariz. & Nev.	1305

† Except where such work is located entirely within cities, towns, or villages.

Does not specify paving and bridge work.

[1] Tr. 42486-87.
Com. Ex. 1205 H.

also contained in the price lists of other companies.[2] Many companies on the Pacific Coast made direct sales to counties for all types of county work located outside of cities, towns or villages for years prior to the Code Period. When [Article XI] became effective direct sales were also made to contractors doing county work. The practice of making all such sales direct except where the work is located entirely within cities, towns and villages is shown in the price lists of several companies.[3]

In Southern California large municipalities have always been sold direct.[4] The earliest price list in evidence provided for direct sales to the City of Los Angeles. Several Southern California companies followed this practice.[5]

PRICE LIST

	Date	Company	Destination	Com. Ex.
[2]	3/ 1/29	Riverside	So. Calif.	1205 H
	7/29/29	Southwestern	So. Calif.	1205 M
	1/15/30	Riverside	So. Calif.	1203 O, 1983
	7/29/30	Riverside	So. Calif.	1978-1979
	12/12/33	Southwestern†	Ariz., Nev. & So. Calif.	Resp. Ex. 3750 H
	1/ 2/34	Pacific†	No. & Cent. Calif. & Nevada	954 K-M
	2/17/34	Beaver (quot.)†	Ore. & No. Calif.	427 BB, CC

† When properly authorized to purchase cement for public improvement and maintenance.

[3] Price lists, cit.; *supra*.

[4] Com. Ex. 1205 H.
Tr. 42486-87, 9297-98.

PRICE LIST

	Date	Company	Destination	Com. Ex.
[5]	3/ 1/29	Riverside	So. Calif.	1205 H
	7/29/29	Southwestern	" "	1205 M
	1/15/30	Riverside	" "	1983, 1203 O

Nicklin, Purchasing Agent, Los Angeles Dept. of Water & Power (C) Tr. 9297-98; Com. Exs. 1300-01.

The City of Seattle is sold direct by Superior Portland and other cities have been sold direct.[6] Northwestern Portland reserves the right to sell cities direct.[7]

f. Sales on Railroad Projects

As early as 1922 Superior Portland sold cement direct to railroads.[1] An early price list of Riverside, dated Jan. 15, 1930, provided for sales direct to railroads.[2] Many of the price lists in evidence provide for such sales. Some of them issued during the [Code Period] limited sales to railroads who filed tariffs with state or interstate commerce commissions.[3]

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[6] Tr. 8389.

[7] Tr. 48115, 48182. Resp. Ex. 3789.

[1] Tr. 42901.

[2] Com. Exs. 1983, 1203 O.

PRICE LIST

Date	Company	Destination	Com. Ex.
1/15/30	Riverside	So. Calif.	1983, 1203 O
7/10/31	Southwestern	Arizona	Resp. Ex. 3750 Q
12/12/33	Southwestern	Ariz., Nev. & So. Calif.	3750 H
1/ 2/34	Pacific	No. & Cent. Calif. & Nev.	954 K-M
2/17/34	Beaver (quot.)	Ore. & Calif.	427 BB-CC
1/30/35	Riverside	Ariz., So. Calif. & Nev.	1295 B
1/30/35	Southwestern	Ariz., Calif. & Nev.	1383
2/15/35	Santa Cruz	No. Calif. & Nev.	1265
3/18/35	California	So. Calif.	1305

It is the current practice of several Pacific Coast companies to sell direct to railroads.[4] Northwestern reserves the right to sell railroads direct.[5]

Since the effective date of the [NRA Code] manufacturers on the Pacific Coast have made sales direct to contractors for railroad work.[6] This practice continued [throughout the NRA] and is the current practice as shown by the testimony of executives of a number of companies.[7]

Date	Company	Destination	Com. Ex.
5/28/35	Riverside	So. Calif., Ariz. & So. Nev.	1295 BB-PP
10/22/35	Southwestern	Ariz., So. Calif & Nev.	1285 N
1/10/36	Calaveras	No. Calif. & Nev.	1268
4/1/36	California	So. Calif.	1309
4/ 1/36	Southwestern	So. Calif.	1286
4/ 1/36	Riverside	So. Calif.	1295-5 E
4/10/36	Monolith	So. Calif.	1989
4/11/37	Santa Cruz	No. Calif. & Nev.	1223

[4] Beaver: Tr. 47764-65.
Calaveras: Tr. 42853.
Pacific: Tr. 42838.
Santa Cruz: Tr. 42862.

[5] Tr. 48115, 48122-23.
Resp. Ex. 3789.

PRICE LIST

Date	Company	Destination	Com. Ex.
[6] 12/12/33	Southwestern	So. Calif., Ariz. & Nev.	Resp. Ex. 3750 H
1/ 2/34	Pacific	No. & Cent. Calif. & Nev.	954 K-M
2/17/34	Beaver (quot.)	Ore. & No. Calif.	427-2 B-2 C

[7] Cit., *supra* (fns. 5 and 6, p. 2899.).

g. Sales to Concrete Product Manufacturers

Large cement and concrete products manufacturers which required no dealer service were always sold direct in Southern California.[1] With the advent of [Article XI,] such products plants were sold direct on the Pacific Coast generally. Since the Code Period all manufacturers who have issued price lists have provided for direct sales to this class of business provided it was not for resale.[2]

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[1] Tr. 42486-87.

PRICE LIST

Date	Company	Destination	Com. Ex.
12/12/33	Southwestern	So. Calif., Ariz. & Nev.	Resp. Ex. 3750 H
1/ 2/34	Pacific	No. & Cent. Calif. & Nev.	954 K-M
2/17/34	Beaver (quot.)†	Ore. & No. Calif.	427-2 B, 2 C
5/ 2/34	Southwestern†	Ariz., Nev. & So. Calif.	Resp. Ex. 3750 A-F
12/21/34	Monolith	So. Calif., Ariz., So. Nev. & So. Utah	2021
1/30/35	Riverside	Ariz., Calif. & Nev.	1295 B
2/15/35	Santa Cruz	No. Calif. & Nev.	1265
3/18/35	California	So. Calif., Ariz & So. Nev.	1305
9/ 1/35	Santa Cruz	No. Calif. & Nev.	1356
10/21/35	Riverside*	So. Calif., Ariz. & So. Nev.	1295-3 F-3 S
10/22/35	Southwestern*	Ariz., So. Calif. & Nev.	1285 N
12/ 2/35	California*	So. Calif., Ariz. & So. Nev.	1308

It is the current practice of a number of Pacific Coast companies to sell direct to products manufacturers without limitation regarding resale.[3]

With the advent of the [NRA Cement Code] Pacific Coast companies made direct sales to commercial concrete mixing plants. Many companies have made such sales direct to mixing plants ever since the Code, limited to their own processing operations and not for resale.[4] And this is the current practice of a number of companies.[5]

h. Sales on Water Supply Projects

After the enactment of the [NRA Code] it was the practice of companies on the Pacific Coast to make direct sales to owners or contractors for water supply projects (including power development, flood control and water supply) and this practice has been followed since the Code.[1]

Variations which appear in the price lists of some of the companies are:

Date	Company	Destination	Com. Ex.
1/10/36	Calaveras	No. Calif. & Nev.	1268
4/ 1/36	Riverside	So. Calif.	1295-5 E
4/10/36	Monolith†	So. Calif.	1989
10/12/36	Southwestern	So. Calif., Ariz. & So. Nev.	1981
1/11/37	Santa Cruz	No. Calif. & Nev.	1223

* Sales were not limited for their own processing operations and not for resale.
At their permanent places of business.

† To concrete products manufacturers only.

[3] Cit., *supra* (fns. 5 and 6, p. 2899).

[4] Price lists, cit., *supra* (fn. 2, p. 2905).

[5] Cit., *supra* (fns. 5 and 6, p. 2899).

[1] Price lists, cit., *supra* (fn. 2, p. 2905).

"Where dealer service is not required," "Except work located entirely or principally within cities, towns or villages, such as reservoirs, culverts, etc.", "Also storm drains, grade separations or tunnels," and "Except work located within cities, towns or villages."[2]

The current practice of a number of companies is to sell direct for major water development, flood control projects, and irrigation districts.[3]

i. Sales on Paving and Bridge Work

In January 1930 Riverside announced that in Southern California it would make direct sales to owners or contractors doing paving or bridge work.[1] There is no evidence that any announcements were issued concerning such work during the [Code Period.] In July 1935 Southwestern announced a similar provision[2] and this was followed subsequently by other Southern California companies. This practice has continued in Southern California, Arizona and Southern Nevada but was never adopted in Northern California, Washington or Oregon.[3] In January 1930 some

[2] Id.
[3] Cit., *supra* (fns. 5 and 6, p. 2899).
[1] Com. Exs. 1983, 1203 O.
[2] Com. Ex. 1284 O.

PRICE LIST

	Date	Company	Destination	Com. Ex.
[3]	1/15/30	Riverside	So. Calif.	1983, 1203 O (letter)
	7/ 8/35	Southwestern*	Ariz., So. Calif. & Nev.	1284 O
	10/21/35	Riverside*	So. Calif., Ariz. & So. Nev.	1295-3 F-3 S
	12/ 2/35	California*	So. Calif., Ariz. & So. Nev.	1303
	4/10/36	Monolith*	So. Calif.	1989
	1/11/37	Santa Cruz	So. Calif., Ariz. & So. Nev.	1225

* Includes storm drains, grade separations and tunnels.

dealers protested against allowing paving contractors to buy direct at the dealer's price, taking the position that cement for a pavement only should be sold direct, but that cement for curbs, gutters or sidewalks should not be sold direct unless they were a part of the original paving contract. Manufacturers continued to sell paving contractors direct.[4]

j. Sales For Use on Mines, Storm Drains, Flood Control, Grade Crossings and Power Developments

In addition to the usual types of work which came to be sold direct Southwestern (Victorville), in its price list of October 12, 1936, announced that it would make direct sales for use in mine construction, storm drains, flood control projects and grade separation projects located outside of cities, towns or villages.[1] Northwestern reserves the right to sell mining companies direct.[2] The current practice of a number of companies is to make direct sales for use on flood control projects.[3]

k. Industrials

Industrials were sold only through dealers.[1]

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[4] Com. Ex. 1203 M.
Tr. 42678-80.

PRICE LIST

	Date	Company	Destination	Com. Ex.
[1]	10/12/36	Southwestern*	So. Calif., Ariz. & So. Nev.	1281

* Purchases for mine construction, Use in Paving, Bridge and Grade Separations.

[2] Tr. 48115, 48132-33.
Resp. Ex. 3789.

[3] Cit., *supra* (fns. 5 and 6, p. 2899).

[1] Com. Ex. 736 B-C.

1. Other Price Lists

In addition to the price lists issued [during the Code Period] which contained a statement of the various classes of trade there were a number of price lists which merely stated that the prices quoted "are in compliance with classifications stated in the Code." In addition to the price lists which contained some classification of customers, there were many price lists which had no such provision whatsoever. There are also a number of supplements to price lists which do not reaffirm the terms and conditions of sale, or the classification of customers named in the price lists.[1]

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[1] Price lists, cit., *supra*.

PRICE LIST

Date	Company	Destination	Com. Ex.
12/12/33	Monolith	West. Wash.	2111
1/ 2/34	Santa Cruz	No. & Cent. Calif. & Nev.	1220
5/14/34	Santa Cruz	Oregon	1215
12/14/34	Monolith	So. Calif.	2023 A-D
1/24/38	Southwestern	So. Calif.	1280 F, G

PART XVIII

SOME EXPRESSIONS BY CEMENT EXECUTIVES AS TO SOME ASPECTS OF COMPETITION

A. Introduction: Denials of Agreement.

The Findings recite a few excerpts from correspondence and testimony by cement company executives indicative of the opinion that free competition cannot or may not exist in the cement industry.

On the other hand, there are other statements by many company executives indicating their firm conviction that free competition, and severe competition, exists in the cement industry. Moreover, there are many statements of fact throughout the record which are wholly inconsistent with any planned scheme of restraint. This Part sets forth the letters and testimony in which the quotations used in the Findings appear and illustrative excerpts from the testimony of executives concerning freedom of competition in the industry and the existence of factual conditions inconsistent with restraint. Many statements of similar nature have already been set forth in connection with the topics to which the testimony specifically refers. Many of the excerpts of illustrative testimony set forth below reveal the argumentative nature of the questioning of cement executives by Commission's counsel.

There are many hundreds of denials by company executives, both from the Commission's and Respondents' witnesses, of agreements with competitors as to specific transactions. The tabulation on pages 2912-14 sets forth references to the transcript to the specific denials by company representatives of agreements between witness's company and any other respondents at any time to:

1. Fix prices.
2. Sell at delivered prices.

DENIALS OF AGREEMENTS AS TO:

	1. Prices Generally	2. Selling at delivered Prices	3. Method of Calculating Prices	4. Establishment of a base	5. Basing Point to be used	6. Use of Institute Rate Books	7. Allocation of Business	8. Limitation of Production	9. Qualifications of Dealers	10. Classification of Customers	11. Limitation of Trucking	12. Terms of Sale	13. Sales Policies
Aetna Calvin, President		30112					30016		30162				
Alpha Coogan, Vice President	23340 23872	24887		23152-53 24573-74	23153	23276-77 24631	25026-27	25006		24734	23742 23653	23340 23467 24886	23339-41 24734
Ash Grove Sunderland, President	47633-34	13742	47633										47633
Bessemer Warren, F. B., Vice President	32101 32104						32219	32219	32182 32185		32288		
Coplay Blum, President	48099	48099	48099		48099			48100					
Cumberland Pearson, Secretary-Treasurer	39873-74 39851	39820-21 39851	39851 39873-74			39860-61	39826-27 39860	39860	39858	39857	39845		39822 39839-40 39873-74
Dewey Moore, Vice President	46780 46988 47145	46779 46988 47035	46780	47145	46691	46703	46736	46733-34	46902	47085 47090-91 47100-01	46666-67		
Diamond Raff, President	47758		47758										
Edison Sweeney, Vice President	35806	35805 35798	35805		35805	35804	35778 35806	35779	35724		35683	35784	
Federal Bates, Sales Manager	30579							30484	30672-74	30701-02	30656-57		
Glens Falls Titsworth, President		47912	47900 47912	47893	47912	47912-13	47890				47912		
Green Bag, W. Va. Wood, General Manager				29407 29513	29513				29530	29535		29535	
Hawkeye Manley, General Manager	41617 41815			41617			41607	41608	41630-31		41628		
Hercules Brobston, President	26127		10595	26086-87		26173	10581-82			26068	26183-84	26527-29	26137
Hermitage McGovern, Sales Manager	36285-86 36334-35	36122 36334	36334		36334	36166	36107	36107	36231-32	36201-02 36335	36176	36335	
Huron Crapo, Vice President Rooney, Vice President	11392-95 33665-66												

DENIAL OF:

14. Diversions	1. Agreement to Follow or Use of Compendium	2. Discussion of Price Changes or New Terms in Advance	3. Receiving Lists of Basing Point Prices from Competitors	4. Influence of Institute on Company's Prices	5. Influence of Institute on Company's Marketing Policies
				30170-71	30170
23323-26	23942	23339	24598		
32408	32225		32338 32350	32227	
			39822-23		39873
	47067-68				46703 46774-75
		47758		47759	47759
	35802				35801
30627			30584-85	30593 30715	30715 30943
		47899-900		47913-14	47913-14
	29539		29513 29516	29515-16 29879-80	
41626	41817		41617	41620	41620
		26137 26456		26136 26441-42	26450
					36252 36333-34

DENIALS OF AGREEMENTS AS TO:

	1. Prices Generally	2. Selling at delivered Prices	3. Method of Calculating Prices	4. Establishment of a base	5. Basing Point to be used	6. Use of Institute Rate Books	7. Allocation of Business	8. Limitation of Production	9. Qualifications of Dealers	10. Classification of Customers	11. Limitation of Trucking	12. Terms of Sale	13. Sales Policies
Keystone Scott, H. M., President						27482		27416	27490-91	27493	27375-76		
Kosmos Horner, President	35897				36899	36982		36834-35	36961	36820			
Lawrence Ackerman, Vice President				31206	31206	31274	8205 31277				31278	31268-69	
Lehigh Bowen, Vice President	27162		26617	26657	26617 26657						26892-93	26821-22	27008
Lone Star Hogan, President	34663	34572-73	34663-64		34663	34679	34569		34560	34560	34556 34671	34560	
Koch, Vice President	33196	32721-22				33105			32829-30 32841		32866		
Marquette Colburn, Vice President	39035 39051	39051-52	39051		39035		39036			39036			39051-52
Medusa Dawson, Vice President	40056 40060			40051						40066-67			
MacFarland, Vice President	31049-50	31043-45 31049-50	31049-50	31049-50	31049-50	31049-50	30966 31049-50	30966 31049-50	31049-50	31049-50	31028-29 31043-45	31049-50	31049-50
Missouri Alexander, President	37119 37123	37167-68		37122 37123	37123	37315-16		37183	37215-16	37270	37131	37286	
Monarch Brooke, Vice President				42192 42333	42192		42220-21		42332		42199		
National Dannelly, Vice President		39706	39705-06	39632	39631-32 39706	39591	39592-93				39582 39706	39510	
Nazareth Robeson, Vice President	28005			28357	28357	28357	19063-64				28138	28208	
Nebraska Hoenig, Sales Manager		42005-06	42005-06				41961	41961	41963-64		42045		
North American Porter, President	33921-22 34002		34002	33816-17	34001-02		33789-90	33792	33896-97		33845-46	33921-22	33919-20
Northwestern Hollister, President	48118-19 48120	48121				48119				48115-16		48118-19 48120	48118-19 48120
Northwestern States MacDonald, B. A., Vice President	36546 36483			36483			36471	36492-93	36484-85	36520	36487	36612	

DENIAL OF:

14. Diversions	1. Agreement to Follow or Use of Compendium	2. Discussion of Price Changes or New Terms in Advance	3. Receiving Lists of Basing Point Prices from Competitors	4. Influence of Institute on Company's Prices	5. Influence of Institute on Company's Marketing Policies
			27518-19		27557-58
36953	37002-03		36924	36897	36897
	31277-78	31228		31269 31324-26	31269
	27004	26930-31	26656	27007	27007-08
					34663
			32825		
				39038	39038
	40190 31049-50		40051	40060	40060-61
37134	37331 37415		37123	37220-21	37220-21
	42304-05		42192	42322 42362-64	42322 42362-64
39580	39587-88				39584 39586 39588
				28005 28419	
	42100				41961-62
	33918-19				33919
48119	48117-18			48116-19	48116-19
36487	36507-09		36483	36494	36502-03 36494

Five respondents, Georgia, Giant, Standard, Utah and Vulcanite, adopted denials of agreement made by witnesses called in behalf of other respondents.

The witnesses' testimony adopted by these respondents appears at the following pages of the transcript:

Brobston, President, Hercules (R) Tr. 26196, 26208, 26441-42.

Alexander, President, Missouri (R) Tr. 37214-17, 37243, 37315-16.

Elcock, Vice President, Southern States (R) Tr. 37605-08.

Lucas, Vice President, Petoskey (R) Tr. 38691, 38703, 38709-10, 38720.

Dannelly, Vice President, National (R) Tr. 39509-10, 39706-07.

Testimony was adopted by these respondents pursuant to a ruling of the Trial Examiner made in order to save time. See Tr. 38463, 38632, 39018.

3. Calculate prices by any specific method.
4. Establish a base.
5. Use a particular basing point.
6. Use Institute freight rate books.
7. Allocate business.
8. Limit production.
9. Restrict sales to dealers having specific qualifications.
10. Classify customers.
11. Limit trucking.
12. Use particular terms of sale.
13. Follow certain sales policies.
14. Diversions.
15. Follow the Compendium, and denials of use of the Compendium.

and denials that:

1. Respondents discussed with competitors price changes or new terms in advance.
2. Received lists of basing points or basing point prices from competitors.
3. The Institute influenced companies' prices.
4. The Institute influenced companies' marketing policies.

B. Citations in the Findings.

Horner, President of Kosmos, wrote to Speed, President of Louisville, on July 5, 1919, giving expression to his objection to secret prices, alleged to be given by Louisville. He wrote:

> "I am going to ask for an interview on cement prices and am writing this letter in advance for the

[Italicized part quoted in Fdgs. Par. Six (b)]

sake of precision and so that you may consider the points I make before we meet. I am setting down quite frankly and without reservation what I see in the present situation. If my facts or inferences are wrong you can set me right.

I see that you have a great many important affairs on your hands and that, after you have directed the general sales policy of your cement company you have done all that you can or should do in that department. You recognize that, in the long run, all cements must be sold at the same price, since they must meet the same specifications, so that, since no permanent advantage in price can be maintained, it is better, rather than sacrifice revenue for a temporary volume, to develop only selling methods that have permanent value, and, in the meantime, take the full benefit of the price level that competition permits. *You also recognize an obligation of what I might call sportsmanship to compete with the companies on their own level.*

Therefore you direct your sales department to sell on the general price basis (which is easily ascertained) of your competitors. But some of your organization do not believe apparently, that a sufficient volume can be obtained in that way. Therefore they satisfy you by taking orders at the prices you direct, but they give a rebate in one of the thousand ways a rebate can be arranged and cover it up in the accounts where you will not see it unless you happen to investigate particularly.

A case in point is the Cahill road work at Lexington, the contract for which, I am told, reads at the same figure that we quoted, but which one of the officials of your own company told us was sold for less. There are a number of apparently similar cases in Louisville.

Speed cement is as good as any cement made and there is no reason why it cannot be sold at as good a price as any other, except that some of your people do not think it can be. In order that they may do their work in what is temporarily the easiest way your revenue and the reputation of your cement are sacrificed, for, irrespective of its merits in use, peo-

ple will not believe that a cement which is habitually sold at a cut price is as good as one that is not. That, however, is not my business and I trust you will believe that I am not pretending to tell you how to run yours. My concern is with the fact that, when the pressure of loss of business becomes great enough, we shall have to reduce our price level to equality with your real prices, while we think the present return which we are getting and which you have a right to expect from your contracts as they read, is only sufficient to give the necessary profit over present costs to provide for the sound condition and continued development of the business.

I am quite aware that a man in your position is not going to take any chances of acting illegally in order to improve his profits. I do not think we are doing anything illegal in connection with maintaining the level of prices that we hold to, but you may have a different opinion as to that. I do not see, however, how anything could be more persuasive of a combination in restraint of trade than taking orders at a uniform nominal price and secretly rebating from this figure. The mere fact that an agreement has been violated is no proof that it does not exist. As the rebates are also apparently of varying amounts in different cases, they would seem to constitute an offense against the Federal Trade Commission act, which calls for equal prices to similar purchasers in similar circumstances."[1]

In a letter to Boettcher, President of Ideal, written on April 18, 1931, when the impact of the depression on the cement industry gave expression to the idea of restriction upon untrammelled competition which later became the expressed policy of the Government enacted in the NIRA, Sunderland wrote:

[Italicized part quoted in Fdgs. Par. Ten (e)]

"My present conviction is that the five or six interests which apparently observed the published

[1] Com. Ex. 3211.

market at the recent Oklahoma bidding, should get together as soon as possible and organize, for mutual protection and to map out a constructive program. Until at least a few of us can present a solid front and have something constructive to offer, I feel any individual efforts to try to placate our belligerent Eastern friends would be futile at this time and might longer delay market recovery.

On account of commitments I cannot readily change, I shall be away the greater part of next week; but if it is agreeable to you and your mind reacts favorably to the above suggestion I shall be very glad to try and arrange such a conference at Kansas City at the earliest date after my return as may best suit your convenience.

* * *

I believe by intelligent cooperation we can, without violation of law, at once protect ourselves against each other, minimize the losses the enemy seeks to inflict, and enhance our influence in shaping such reconstruction moves as are bound to come in some form sooner or later; and perhaps be instrumental in hastening the end of present demoralized conditions, which to my mind are as senseless as they are serious."[2]

McCourtie, President of Trinity, responding to Young, then Chairman of the Public Relations Committee of the Portland Cement Association, who had requested information as to plant capacities, wrote on April 23, 1931:

"Beginning with 1916 when the Association commenced to develop into what it has since become this Company has without a single exception, so far as I can recall, complied with every request—whether for information, statistics or otherwise—made of us by it, and we have not only contributed in accordance with our size, but have at all times encouraged proper expansion, notwithstanding such expansion

[2] Com. Ex. 2245.

[Italicized part quoted in Fdgs. Par. Ten (e)]

would involve additional expense. *In view of the fact, however, that conditions indicate—at least as I see them from this distance—that a dissolution or a disintegration of the Association is now imminent, I can see no very good reason for its acquiring or our giving any information which is intended to be used for the benefit of the industry as a whole.*

If one of the larger units in the industry—such as the one with which you are identified—can justify the broadcasting of quotations three or four hundred miles further from its mills than it ever heretofore has made either quotations or shipments, and to which territory it does not expect to make any shipments—the quotations being made simply for the purpose of compelling another manufacturer, legitimately and properly serving that territory, to sell his product at a much lower price than he otherwise would—then I can see no very good reason for maintaining an Association, nor to further attempt any active cooperation with such units.

Frankly, I cannot make myself enjoy the idea of any other company giving away my money, not only without saying 'by your leave', but without a commercial grievance of any kind against us that would in any sense justify such action.

If—as—and when—the executives within the industry again pull themselves together, act sanely and do business as business ought to be done, there will be no difficulty in obtaining our cooperation all along the line and in every proper way."[3]

On May 17, 1934, Treanor, President of Riverside, wrote to Rader, then Chairman of the Code Authority, in reference to a request by the President of the United States for f.o.b. mill prices from the cement industry and the reply thereto by the Code Authority, requesting a conference with the President to explain the reason for delivered price quotations. The letter in full is as follows:

[3] Com. Ex. 1195.

[Italicised part quoted in Fdgs. Par. Seven (r)]

"I have been thinking about your telephone call, from which I get the impression that you sent a pretty unyielding telegram to Murray—as you say at least that you 'did not intend to make any concession before the "trading" starts.'

Now I would have conceded the mill price at once on Federal business and I would have indicated a very open-minded attitude toward the larger question; and this to create the impression, deliberately, that something besides obstruction and short range trading can be had out of the cement industry. I would have taken advantage of this great opportunity to lay a telegram on the President's desk which he would have read. We know he is watching the cement question. I would have tried to strike a new note of cooperation and reasonableness, in contrast with what Ickes and the Federal Trade Commission tell him about us. This could have been the beginning of a real campaign for better public relations. I don't think this chance is yet lost—that is why I am writing you. The only thing that I think has been lost is a neat opportunity to score our point with the President himself.

As a member of this industry, my fate is to a considerable extent in your hands, so that I have both a right and a duty to let you know my views.

If we were a generally well regarded industry, we might be justified in taking a stiff trading position upon the President's request. However, we are anything but popular, we have a very difficult position to maneuver out of, and we should not gamble unnecessarily, running as we do the risk of a blast from the President's office that may be ruinous.

The f.o.b. mill price on Federal business is of no real importance, is entirely practical to grant, can and I think will be forced out of us—therefore good trading would have been to give it without any trading.

Now, when it comes to the larger question of mill price on commercial business, much as I would like to think otherwise, I am convinced that we will have to maintain our basing point position and refuse the

[Italicized part quoted in Fdgs. Par. Seven (r)]

President's request. It will not be an easy refusal to defend upon economic grounds. It will be almost impossible to persuade an unsympathetic government that we are justified in our refusal. But the least we can do is to prepare the way by an initial showing of open mindedness; which might entitle our later arguments to sympathetic hearing.

[Italicized part quoted in Fdgs. Par. Twenty-one (f)]

Do you think any of the arguments for the basing point system, which we have thus far advanced, will arouse anything but derision in and out of the government? I have read them all recently. Some of them are very clever and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy.

[Italicized part also quoted in Fdgs. Par. Six (b)]

The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined. We sell in a buyer's market all the time. The capital cost, as distinguished from the out-of-pocket cost, of producing cement is extraordinarily large. In free competition this capital cost is whittled away and this means loss and ruin.

Now an industry in this fix needs some sympathetic understanding on the part of the government. I think our case *can* be made out, but it is not going to be done by the route of hard boiled short-range trading. We are either dealing with a very important large question of public relations or we are not. If we are not, we don't have to be so careful of our methods. If we are, then we had better approach the question in a large way; and the first approach is to acquire some good will in governmental quarters. All that we need for our reasonable prosperity is consistence with the President's original plan for NRA.

I haven't seen the telegram you sent. This letter may be unwarranted and is pretty sure to make you sore, but it is based upon your remark about 'trading' and upon some general views of industry policy which I heard advanced by some of the very influential men of our industry.'"[4]

Coogan, Vice President of Alpha, denied the validity of of Treanor's opinion and the existence of any restraints upon competition. He testified:

"*By Mr. Wooden:*

Q. I take it that you do not agree, then, with Mr. John Treanor, when he characterized that position as being one of sheer bunk and hypocrisy? A. I do not agree with Mr. Treanor in that statement.

Q. Do you agree with his statement made in the same connection that the industry must systematically restrain competition or be ruined? A. I don't know anything about the industry in the territory where Mr. Treanor was active. I know that those conditions do not exist in the territory where we compete.

Q. Do you think that the industry in the territory where you compete must systematically restrain competition or be ruined?

• • •

A. I don't think that the industry in the territory where we compete in any way restrains competition.

By Mr. Wooden:

Q. Do you want to make that answer applicable as of any given time or period, or do you make it covering your whole experience in the industry? A. Well, I would make that all the time. The competition, of course, has been quite different over the period of years, but generally speaking, and so far as I know, there has been no restraint to that competition.'"[5]

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[4] Com. Ex. 7.

[5] (R) Tr. 24917-20.

Two months prior to his letter to Rader, Treanor wrote, on March 5, 1934, to Bernard Kilgore of the Wall Street Journal an extended discussion of the conditions of potential supply and limited demand for cement and the resulting severity of competitive conditions in the industry. He concluded his letter under a sub-title "Cement prices", in the discussion of which he said:

> "Like all staple commodities, cement is sold in units, a barrel from one mill being commercially equivalent to a barrel from any other mill anywhere. The selling price at a given time and place, logically, should be the same and under the operation of the law of supply and demand, of course it tends to be the same. But the equilibrium of price which is attained under this free play of economic forces rarely yields a profit in the cement business. Please recall the large percentage of idle equipment in the form of standby capacity which I have described in the first part of this letter and which the chart that Mr. Smith left with you shows to have existed for the past twenty-five years. The meaning of this is that the cement market is practically always a buyer's market, the potential supply practically always exceeding the demand. In these circumstances, under the theory of unrestrained competition the price is cut by one producer after another and comes to rest at some irreducible minimum. This eventual minimum resulting from competition is not of course the price which will yield a fair return upon the average investment. Competition goes further than this, wipes out all profit margin, all reserves for maintenance and depreciation, exhausts the producer's working capital and finally consumes the funds of his creditors, in so far as they fall temporarily within the control of the producer struggling for survival. Receivership and bankruptcy do not end this cycle of destruction. The plant of the bankrupt is acquired under forced sale at bargain prices and the struggle goes on to the point of ruin for many or most of the participants. This is an old story, but it is also quite up to date, for this is just what has been going on in

the cement business for the past three or four years and the process has had a fatal ending for a good number of companies.

The point which I would like to make is that this aspect of competition is more constantly threatening in the cement business than in any other that I know about, owing to its standardized product, its perennial excess capacity, and to the large proportion of bookkeeping charges entering into cost. When a company is in a fight and in distress it ignores bookkeeping. The indirect, capital, or bookkeeping part of cost representing the fixed capital of the industry, becomes then, in effect, a war fund, a subsidy for the injury or destruction of its competitors.

[Italicised part quoted in Fdgs. Par. Six (b)]

Now it is to the credit of the men responsible for the capital invested in the cement business that, in the face of this peculiar menace, they have been as successful as they have been in avoiding the extreme evils of such a system; that, foreseeing the dismal end-product of unrestrained competition, they have by forebearance and skill, consciously obtained equilibrium at something above the level of ruin, even sometimes within the zone of profit.

They have done this, where it has been done, through the open price system and I beg leave to say that in such an industry as ours, it cannot be done in any other way. The open price system enables sensible men, acting within the law, to avoid ruin and sometimes to make a fair profit. Its successful operation depends upon the virtues of self-restraint, and of intelligent consideration for the needs of the other competing factors in the industry. It would be a real calamity for this and for other industries, to have this reasonable system of price making misunderstood and discredited, as it is by some of the current comment.

Of course the basing point method of fixing destination prices is a necessary complement to the open price system in the cement business."[6]

[6] Com. Ex. 553-3 D, 3 E.

Making clear his idea of the one, and only desirable, limitation upon complete freedom of competition, Treanor, writing to Dr. Clark, the economist, on August 27, 1935, said:

> "The one thing which I personally desired from the N.R.A. was enforcement of the rule that no sale should be made, directly or indirectly, excepting at the price which the seller holds out to the world as his invariable price to one and all. Personally, I have not been seriously interested in waiting periods, or in any other contraptions. Without these, once the principle of *openness* is established, I believe a decent standard of commercial morality will develop.
>
> This is the only restraint upon competition which I consider desirable. What does it amount to? To the assumption of responsibility for his acts by the man who decides to cut the price. He cuts at once to all his customers. He accepts the consequences at once in a lower price upon all his sales, instead of secretly cushioning himself in his cuts to a few customers, at the expense of all the rest of his customers. It seems to me that the critics of the basing point system, that is, the advocates of the non-discriminatory mill price system, are in a poor position to challenge this doctrine of the open price."[7]

During preliminary negotiations between Dr. Arthur E. Morgan and members of the cement industry concerning sales of cement to the Tennessee Valley Authority Dr. Morgan prepared a memorandum dated February 28, 1934 addressed to his Board of Directors in which he referred to a luncheon that day with Treanor, President of Riverside; Conn, President of Giant and of the Institute; Porter, President of North American and Smith, President of Penn-Dixie, both trustees of The Institute. The memorandum stated *inter alia*:

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[7] Com. Ex. 958-4 D.

[Italicised part quoted in Fdgs. Par. Sixteen (f)]

"We discussed the Tennessee Valley Authority and its building program, and then discussed our need for cement. Mr. Conn and the others present undertook to explain to me the general nature of the organization of the industry. The personal impression I received from listening to them is that, in their opinion, uncontrolled price competition in a staple industry will tend to destroy that industry, that some kind of control is necessary for stabilization, and that the cement industry has sought to bring about such control; that the problem is a difficult one and has not been completely worked out, especially in its relation to the public. There might be superficial appearance of collusion and conspiracy against the public, when in fact there was only an honest effort to stabilize the industry for the benefit of everyone concerned. Mr. Conn said it was difficult to see how the public suspicion in this case could be allayed."[8]

Porter, examined as to what transpired at this luncheon, testified:

"Mr. Porter, can you recall whether or not there was anything discussed at this luncheon about uncontrolled price competition? A. No, I am pretty sure there wasn't anything of that sort discussed.

Q. Was there anything discussed at that luncheon, to the best of your recollection, as to whether or not the cement industry had found the matter of stabilizing competition a problem, or was there any discussion of that nature that you recall? A. If you are referring to Mr. Treanor's theories, I am quite sure that that did not come up at the meeting.

* * *

Q. Well, as to that subject matter, Mr. Porter, what to your knowledge, has the cement industry done to bring about control of price competition in order to stabilize the industry? A. I don't know of

[8] Com. Ex. 344 A.

anything they have done. I am quite sure that they haven't done anything.

Q. Do you recall whether or not there was any discussion at this luncheon with respect to the appearance of collusion and conspiracy in the cement industry?

• • •

A. I don't remember any such discussion.

By Mr. Werle:

Q. I believe you did say, however, that there was some discussion about T.V.A. negotiations or negotiating in connection with a fair price; is that correct? A. Yes, that is correct.

Q. What was that discussion? A. Well, Dr. Morgan felt that a fair price should be based on cost of production, and thereafter, reliable figures for cost of production could be gotten.

Q. Do you recall who brought the matter up? A. Well, I think that Dr. Morgan brought the matter up first.

Q. Did you express your approval of the suggestion that T.V.A. get together on this matter with the bidders in the Tennessee Valley area? A. Why, I don't think so; certainly not in any formal way. I wasn't concerned in the matter. It would have been presumptions [sic] for me to have done that, but I might have stated that I thought they were doing the sensible thing, or something of that sort.'"[9]

Affleck, President of Universal Atlas, testified in hearings before the Senate Committee on interstate commerce held during March and April, 1936. He was examined as to a Government bid for 365,000 barrels concerning which he testified:

"The Chairman: As a matter of fact, when you get an order for 365,000 barrels of cement from the Government of the United States it means that it is more than half of the production of your plant in any year except one.

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[9] (R) Tr. 33946-48.

[Italicized part quoted in Fdgs. Par. Six (b)]

Mr. Affleck: Yes.

The Chairman: And the larger the production you have means that your overhead per barrel is lower?

Mr. Affleck: Yes.

The Chairman: And it means that cement can be produced cheaper?

Mr. Affleck: Volume will reduce cost. *And, as I stated before, this would have been a very attractive order for any one of the four bidders, but we did not care to break the market, and probably the others did not. We have to live with this market a long time, and jobs such as this Beverly job will not be with us year after year.*"[10]

And further:

"The Chairman: On this extremely large order of 365,000 barrels, the largest order that any of these people probably had for many years, how did they know but that you were going to make a lower price?

Mr. Affleck: They did not know, but they thought we would have sense enough not to break down the market.

The Chairman: They thought that you would have sense enough to charge the Government the highest price, notwithstanding the fact that this was the largest order your factory had ever received.

Mr. Affleck: I would like to put it that we would charge the Government the same as we would charge a little farmer in Beverly."[11]

Reiter, then General Manager of the Institute, also testified at these hearings. The excerpts in the record are as follows:

"What are the more favorable terms that one mill can offer as against another?

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[10] Com. Ex. 2878 I.

[11] Com. Ex. 2878 J.

Mr. Reiter: Senator Wheeler, in general answer to your remarks here, I believe that it is the general opinion in our industry that the uniform price may indicate that competition has existed before that price is made. In other words, being a standard material, it necessarily seeks a level at the same price, but the level it seeks is the lowest price quoted. We had that experience under open-price filing in the code.

• • • • •

The Chairman: In the advertisement entitled 'Wheat and Cement' they say (reading):

> 'The cement business is as highly competitive as the grain business.'

You do not subscribe to that, do you?

Mr. Reiter: I feel that when a uniform price is made it must seek a level at the low point. I think it does represent competition. That is the real difference between the opinion of the industry and the opinion of the Government. I will grant you that, Senator Wheeler.

• • • •

[Italicized part quoted in Fdgs. Par. Six (c)]

The Chairman: One of your advertisements states (reading):

> *'Under the old system there were only as many competitive points as there were mills. Now, every village, town, and city is a point of competition.'*

No village, town, or city has competition in price or quality at the present time, has it?

Mr. Reiter: Of course, what that advertisement is trying to do is to defend the destination price.

The Chairman: Yes; but, as a matter of fact, no town, or city has competition as to prices or as to quality of cement, has it?

Mr. Reiter: Generally, that is true."[12]

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[12] Com. Ex. 3878 S-T.

C. Identical Prices.

As to the existence of competition whether delivered price quotations are identical or not, Affleck, former President of Universal Atlas, testified:

> "You told us there is competition when delivered prices are the same, and competition when the delivered prices are different, and that certainly calls for my question whether the competition is greater in degree in one case than in the other? A. My answer to that is that if—if I am trying to get some business that someone else is trying to get, and I make the same price that he does and get the business, I have been in competition with him and successful competition.
>
> If I cut the price and offer my goods at a less price than he does and get the business, I have also been in successful competition with him. And, reverse the thing and you have the vice versa order. But it is competition whether prices are the same or not.
>
> If two or more people are trying to get the same thing, they are competing for it."[1]

Again, as to the existence of competition whenever two or more cement makers strive for the same business, Affleck testified:

> "A. The effort and strife of two or more cement makers to get the same business from—get the same business.
>
> Q. Of course, that involves freedom from restraint or collusion? A. Correct.
>
> Q. No agreement? A. If I may—well, skip it.
>
> Q. Is that true, though the prices are the same, or does that involve prices being different. A. Competition is there when the price is the same. It is quite out of the question for it to be stated that one of the competitors have a lower price. If one must have a lower price in order for there to be competition,

[1] (R) Tr. 34938-39.

who is going to select the competitor that is to have the lower price?

If—I would think that I was a poor salesman, or poor sales manager, if I couldn't sell the goods at the same price as my competitor sells his goods.

If, to create competition, I must reduce my price, I am confronted with the probable certainty that my competitors will reduce their price. And then they are on the same or equal level and it is competition whether prices are the same.'"[2]

Of similar import is the testimony by Coogan, Vice President of Alpha:

"Q. Mr. Coogan, you used the expression just before recess of a price war. What is your conception of a price war? A. I should say a period of successively lower prices until such prices get far below costs.

Q. Do you use the word 'war' in that connection as implying any element of intent to injure an opponent? A. No, I do not.

Q. To that extent the word 'war' is not well chosen? A. No, you could use a better word.

Q. Do you make any distinction in your mind between a price war and price competition? A. Well, you always have price competition but you don't always have what I have referred to as price wars.

Q. In other words, you consider the identity of delivered price as price competition? A. I don't consider the identity of delivered prices. I consider when I meet the lowest price at any destination or at any point where I quote that I have met competition.

Q. Can there be in your mind differences in delivered prices at a given destination without price competition?

* * * *

A. No, I think there can be price competition with differences but I don't think the identity shows the lack of competition.

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[2] (R) Tr. 34871-72.

Q. In other words, two opposite conditions may represent the same situation? A. Yes, I think it could.

Q. Are there any places that you know of in the selling territory of the Alpha companies where at the present time Alpha Company's delivered prices are different from those of competitors? A. Is that all-inclusive? All competitors?

Q. As far as you know. A. Well the only—the only thing that we actually do is to try to make our prices as low as the lowest."[3]

Testifying as to the influence of customers in establishing uniformity of prices, Affleck said:

"Q. To what do you contribute that phenomenon, if it is a phenomenon, that those prices were uniform at a low level to the same extent as the high level? A. As I said before, nobody will pay more for cement than the price at which he can buy it. The customer practically makes the price uniform.

Q. In other words, you think the price—you think the customer makes the price uniform, rather than the method of selling makes price uniform? A. Yes."[4]

To the question as to whether the impact of competition from other products exercises a substantial influence on the price base used for the sale of cement, Affleck testified that it did.[5]

Affleck, again as to the influence of the buyer in establishing uniformity of prices and the resulting influence on the manufacturers thereof, testified:

"This uniformity of price, if I may continue a moment, is a—is a thing not invented and forced upon the public by the cement makers. It's a—it's a thing

[3] (R) Tr. 24494-95.

[4] (R) Tr. 34847.

[5] (R) Tr. 34851-52.

[Italicized part quoted in Fdgs. Par. Six (b)]

that is brought about completely, as I see the picture, by the cement buyers. They will not pay more for anybody's cement than they can buy cement for, and that tends to bring it down to a level.

Q. You don't mean to say, though, that you have no purposes of your own to serve in the making of identical delivered prices on the basing point system? A. Oh, no, I wouldn't deny that at all. On the contrary, I would say that I was committing suicide if I didn't do that, because——

Q. And—— A. On—long experience has shown me that if my—if my competition takes the shape of a lower price of my commodity at the point of delivery, then the market price there, the market price will quickly become, under ordinary conditions that I have named, or the price of that some competitor has named.

Q. Well, if—— A. So I can't deny that I have a motive in not getting the price, the general market price down.

Q. In other words—— A. Provided it's on a fair level. And I think it has been."[6]

The testimony as to the compelling force of competition in establishing all sales at the lowest known price offered in the market is set forth in Part II, Section C, 2, pp. 204 to 212, *supra.*

The use of a common factor for freight is not necessary for price identity at destination. It is sufficient that the going-price at destination is known. Neylan, Asst. General Sales Manager of Lone Star, testified:

"Q. Is it possible within the Lehigh Valley District, to have identical delivered prices at given places or given points, unless the freight is figured at a common factor? A. I would say yes, it would be possible.

Q. Will you tell me how? A. If our company named the price which we figured the fair price in-

[6] (R) Tr. 34946-47.

a town adjacent to our plant, then our competition either has the privilege of meeting that price, quoting a higher price or quoting a lower price.

Q. Delivered price? A. The same proposition applies at every other mill. If they see fit to quote a price which, in their opinion is a proper price, it is within our province, if we are interested in the business, to lower that price, unless we are not out for the business.

Q. That is true outside the district as well? A. It is true within the district——

Examiner Norwood: (Interrupting) That is true where one bids first, where you get one quotation and then you meet it, but suppose you are both naming your prices at the same time, each one not knowing what the other's price will be? How could you have identical prices without knowing definitely the exact freight rate.

The Witness: Well, that is just the point. There have been times when the prices were not identical.

Examiner Norwood: How could you make it identical without knowing the freight rates?

The Witness: We could always meet a delivered price, regardless of how they arrived at it.

Examiner Norwood: I am not talking about that. You are both bidding at the same time and neither one knows what the other is going to bid.

The Witness: That is the thing that gives rise to difference in prices,—the very fact that you are guessing at what the other fellow's price is.

Examiner Norwood: Just answer my question.

The Witness: You could guess at it. That is all.'"[7]

Respondents' witnesses were examined as to their interest in how their competitors calculated prices. Typical of the responses was that of B. A. MacDonald, Vice President of Northwestern States, who testified that he did not care how his competitor arrived at a price but only con-

[7] (C) Tr. 6160-61.

cerned himself with what the price was, if it was lower than his own. He testified:

> "Q. You are not interested in whether your competitors use the same freight rate as you do, even though they use the same basing-point price as a starting point? A. Mr. MacIntyre, we are not interested—the freight rate of our competitors is of no interest to us. The only interest to us is the price that they use at the destination where we are soliciting business. Now, how they arrive at it, whether they use our rate book or freight rate books, whatever such a structure is, it is of no interest to us, how they arrive at it.
>
> Q. Well, if they arrive at the price, though, in quoting at destination, in the same manner as you do, are you not then interested in their using the same rate and the same base price as you do? A. No.
>
> Q. You do not care if they get a different price than you; is that correct? A. We do not care if their price differs from ours, as long as it is higher than ours.
>
> Q. You are interested, then, as to whether or not it differs from yours, if it is lower; is that correct? A. If it is lower than ours, we are going to find out about it, and meet it; that is all, regardless of how they arrived at it.
>
> Q. But if they arrive at their base in the same manner as you do, you are interested in it, if they are lower than you; is that correct? A. Regardless of how they arrive at it, if theirs is lower than ours, we are interested in it."[8]

The testimony concerning price increases is considered in Part II, Sec. F, pp. 600 to 615, *supra*.

Neylan, Assistant General Sales Manager of Lone Star, was queried as to whether his company was ordinarily "glad" to meet a price advance and he testified in effect that the company's emotions did not have any bearing on

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[8] (R) Tr. 36667-68.

the competitive situation involved in the issue. Neylan testified:

> "Q. Ordinarily, are you glad to meet a price advance made by your competitors? A. It depends on the circumstances.
>
> Q. I say 'ordinarily?' A. Well, I cannot say ordinarily. Whether I should like to meet it or not has no bearing on the situation. That is again decided as a matter of policy, and again my opinion may be asked, but not necessarily followed.
>
> Q. Based on your experience with what your company has done, has it been glad and willing to meet a price advance made by others? A. In some instances they have met price advances; in other instances they have not.'"

Hill, Vice President of Louisville, testified that in his opinion competition is present between manufacturers offering cement at the same price or at different prices. They are each competing for the business by one basis of appeal or another. Hill testified:

> "Q. You have testified on cross-examination that when you make the same delivered prices at given destinations you are competing as to prices. You did, didn't you? A. Yes.
>
> Q. Now, I am asking you whether when you cut the prices at a given destination you are competing as to price? A. We are competing with the business for that moment. It may not necessarily be price. It may be some other friendship, it may be some other advantage the shipper has over me, and I try to offset those disadvantages that I have with sometimes a price concession.
>
> Does that answer your question, sir?
>
> Q. To a certain extent. As I understand your testimony, in response to Mr. Leisure's cross examination, you say when different cement mills make the same destination price at a given destination, that is price competition? A. Yes.'"[10]

[10] (C) Tr. 13307-08.

Of similar purport is the testimony of Parsons of Volunteer, Ackerman of Lawrence, Sunderland of Ash Grove, Capen of Dewey, Coogan of Alpha, Fellows of Alpha, Blair of Southwestern, Bowen of Lehigh, Affleck of Universal Atlas, Brobston of Hercules, Harte of North American, Jennings of Southwestern, Lucas of Petoskey, Pearson of Cumberland, Russell of Peerless, Wing of Penn-Dixie, Neylan and Koch of Lone Star, Twamley of Coplay, Bates of Federal and Dawson of Medusa. Part II, Section C, 5, c, pp. 317 to 335.

D. Lowering the Price: Futile as a Means of Increasing Sales Volume: Price Cutting.

Since the demand for cement is related to the demand for other building and road construction and the cost of cement in construction is a minor fraction of the entire cost[1] of the work in which it is used, lowering of price does not necessarily increase demand. Much testimony was taken upon the futility of trying to increase a manufacturer's proportion of sales by lowering the published prices. Competitors are promptly advised of the lower price and meet it. Brobston, President of Hercules, testified:

> "Q. You say that you endeavor to meet the lowest prices quoted by any of your competitors at a given destination. Why don't you endeavor to go below those prices, Mr. Brobston, in your experience? A. The reason that I don't reduce my price is because I know, from my experience of 39 years, that if I make a lower price it would be met immediately by my competitors, and even if I attempted to make it, only in one or two cases, the whole level of the market would be reduced, and I would lose a great deal of money even if I gained a temporary advantage in shipments."[2]

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[1] Part I, Sec. B, *supra*, pp. 32 to 35; Chart I-B.

[2] (R) Tr. 26128-29.

Of similar import is the testimony of Hogan of Lone Star, Coogan of Alpha, Brobston of Hercules, Moore of Dewey, Calvin of Aetna, Lucas of Petoskey, Hanahan of Volunteer, Alexander of Missouri, Davis of Superior, and Warren of Southwestern, set forth in Part II, Sec. C, 4, g, pp. 285 to 292, and the testimony of others listed in footnote 1, p. 285.

The unsatisfactory results obtained from lowering prices in an effort to secure a larger share of available business were described by Alexander, President of Missouri. That company, in 1931, on a bid to the Missouri State Highway Department, lowered its price from its then current market price. Alexander testified:

> "Trial Examiner Norwood: Did that bring about a general decline in your territory?
>
> The Witness: It did.
>
> Trial Examiner Norwood: Did that pay you to do that in the long run?
>
> The Witness: Your Honor, apparently it did not. The Highway Commission permitted our competitors to meet our prices.
>
> Trial Examiner Norwood: Otherwise, it would have helped you, would it?
>
> The Witness: Well, it may be that it would have helped us. We had hopes that it would at the time we placed the bid.
>
> *By Mr. Seeley:*
>
> Q. His Honor's question prompts me to ask you, Mr. Alexander, whether on this letting as a result of these prices which you quoted, did your company, or did it not, receive a larger amount of business—did it increase its tonnage as a result? A. We received about the same percentages of the total award as we had in previous years."[3]

Again, on another bid to the Missouri State Highway Commission, Missouri made a further reduction in price

[3] (R) Tr. 37291-92.

which, according to Alexander's memory made that company low at all destinations at which the bid was invited except three or four. The testimony continues:

> "Q. Did the Missouri Highway Department make an award to your company on all of the cement on which you were a low bidder? A. No.
>
> Q. How did it purchase its requirements other than the award that was made to you, if you know? A. Yes. They permitted our competitors to meet our prices on a substantial part of the business on which we were low bidder.
>
> Q. Now, you have told us that your company bid lower prices on these lettings to the Missouri State Highway Department. Just tell me in one answer, was the result satisfactory or unsatisfactory to your company? A. Well, it was most unsatisfactory. We lost about a million dollars, I think, during the time."[4]

As to the inability to increase business by openly reducing prices and unlikelihood of much success by trying to do it secretly, Bates, J. E., Sales Manager of Federal, testified:

> "A. Yes, I think I testified to the effect that no matter what price we put out that our competitors would meet it and we would all sink to the next step, the next lower level.
>
> *By Mr. Paulson:*
>
> Q. In other words, if you want to compete in price in the marketing of cement you must do it secretly; is that correct? A. No, I would not subscribe to that at all. If we are going to make any prices, that is going to lower the price of our cement, we are not going to do it secretly, we are going to advertise the fact.
>
> Q. Let me put it this way: If you want to reduce the price and get business by reducing prices, you must reduce prices secretly? A. Well, yes, you

[4] (R) Tr. 37294.

probably could secure some business by reducing the price, as you say secretly. It is pretty hard to keep a cement price secret.

Q. It is the only way that you can get business by reducing prices, if I understand your testimony? A. Yes, you might get one particular piece of business by reducing the price secretly, but it would not be long until all of your business would be based on that.

Q. I am trying to eliminate the possibility—to eliminate—now, to find out whether or not you can openly reduce prices and get any business. A. I would say that we cannot increase our business by reducing the price."[5]

Volunteer lowered its price at Knoxville in 1931 "to protect the market", but to no avail. Parsons, its Sales Manager, testified:

"The Witness: No, sir. We can sell our cement at any price we please, but if we make a low price today, it will probably be the high price next week.

By Mr. Wooden:

Q. If you could give up any of that freight advantage there you say the price would be met just as it was in 1931? A. I think it would be the same as in our previous experience where we gained no increase in volume.

Q. Not even temporarily? A. No, sir; our competition still met our price.

• • •

Q. How much did you lower the price in 1931 that was met? A. If I remember correctly our quoted price at that time was $1.90. I am not so sure of that. That was in cloth bags f.o.b. Knoxville.

Q. That was the lowered price? A. Yes, sir.

Q. How much did you lower it from what it had been? A. Mr. Wooden, I do not remember definitely.

[5] (R) Tr. 30846-47.

Q. Was it just one lowering or a series that culminated in that? A. No, just one lowering.

Q. Was that done because some other mill was cutting the price in Knoxville? A. That was done at our own volition.

Q. You took the leadership at that time? A. Yes, sir; in an attempt to protect the market.

Q. Was anyone else lowering the Knoxville price, figuring on a base plus freight? A. Not that I know anything about. I do not know what they may have figured.

Q. You took that lead then without any competitive necessity, as far as the price is concerned? A. Absolutely; it was done at our own will and volition.

Q. What do you mean by an attempt to protect your market there? A. I think I testified this morning that about that time we had lost a great deal of business in Knoxville and we wondered if we reduced our price it would reflect to us an advantage in volume. It did not reflect any advantage in volume and therefore we discontinued our price at that time."[6]

When Peerless lowered the price in Detroit close to its mill it failed to drive any of its competitors from that territory and Peerless' natural advantage in that market could not, in the opinion of its Vice President Russell, be used in such a way as to assure sufficient tonnage from that market to support the company. Russell testified:

"A. The several price changes during that period of 1937 and 1938, did not, in so far as I was able to determine, have any effect on whether different manufacturers changed the amount of cement or were able to change the amount of cement delivered into the area in which we shipped.

Q. Did any company, to your knowledge, cease trying to sell cement in Detroit, during that time when the price was being progressively reduced?

[6] (C) Tr. 5085-88.

A. Not as far as I know. There may have been companies that either increased or decreased their activity, but I have no knowledge of that.

Q. Mr. Russell, do you attempt to concentrate your sales effort in the Detroit metropolitan area? A. We do not.

Q. Will you explain to us, briefly, why you do not attempt to so concentrate it? A. It would be rather difficult to make a brief statement of the many——

Q. Would you give us your reasons? A. —business reasons. But one of the principal reasons I can think of is that if we were to concentrate our efforts within a restricted area, we will say within a fifty mile area, of Detroit, and not attempt to sell outside of that area, as soon as we were to do that, we would not be exerting any competitive pressure on customers outside of Detroit, and would immediately be very vulnerable to intense competition in that particular area, and I know of instances where, to a degree, that has been done by companies with the result that competition moves in and affects both price and volume, and still further restricts the amount of cement or commodity that can be delivered in that restricted area.

Now, to my mind, that is, I think, one of the principal things, but there are many factors that are—enter into that.

Q. Well, could you secure all of the cement that you wanted to ship within that Detroit metropolitan area under the conditions as you see them? A. Only if I were a magician, and I see no way that could be done.

Q. Well, would you also tell us whether it has been your experience that there is a variation in demand in that Detroit metropolitan area, or has it been relatively constant? A. There has been a very considerable variation from year to year in the amount of cement consumed in that area.'"[7]

Marquette "about went bankrupt" by cutting prices on state bids.

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[7] (R) Tr. 34330-31.

Colburn, Vice President of Marquette, testified:

"Q. Do you recall that in 1932, early in 1932, you submitted bids to the State of Illinois that were non-identical with those of competitors? A. Yes.

Q. How is it that they were identical in one case and non-identical in the other? A. In 1932, when they were non-identical, and we secured quite a substantial tonnage from the State of Illinois, our company had about went bankrupt; so that in 1933 we decided to try to get more money for our cement, shipping a lesser tonnage, in order to stay in the business. So that in 1933 we just could not quote prices lower than we found in the territory. We could not exist.

Q. In other words, your prices had to be identical or you could not exist? A. They hadn't to be identical. They had to be higher than they were the previous year."[8]

Crapo, Vice President of Huron, testified that regardless of the relatively high price of the Milwaukee market, which he was free to lower, he would not lower his price because it would bring him no advantage and he had nothing to share with the public in the form of lower prices until the demand for cement rose.

"Q. You have also testified, and your letter to Mr. Affleck shows that the price in Milwaukee, in your opinion, was too high. A. No.

Q. You did not? A. What I hoped to say in that letter was that not that the price was too high, but I didn't like the fighting over the Milwaukee tonnage with more people.

Q. Well, didn't you say something about the price umbrella being so high as to let Dewey come in there with a 53-cent freight rate? A. Well, that was not the straw that had broken the camel's back.

Q. Didn't you testify that you thought that the price in Milwaukee was too high? A. No, because I would put it down if it was too high.

[8] (R) Tr. 39966-67.

Q. I asked you that the other day as to why you didn't put it down. A. Because I was satisfied with it.

* * *

Q. I am just leading up to ask you if you were free to put it down, why hadn't you put it down when you were running on 40% production, or 50% production, and you thought the price was too high. A. I don't think it would increase the sales.

Q. You mean that your competitors would meet it? A. Oh, I think undoubtedly they would meet it.

Q. But, at any rate, wouldn't you then be sharing with the consuming public some of the advantages which you say it is your obligation to share with them? A. We have always shared with them.

Q. Well, isn't Milwaukee a case where you haven't shared, in vew of your statement that the price was too high? I am still holding you to that, and the record will have to show as between us. A. We have been in the red; we have shared everything we got until the volume comes up.'"[9]

Neylan, Assistant General Sales Manager of Lone Star, reiterated the general futility of seeking more business by lowering price.

"Q. Mr. Wooden has asked you several times whether you did any better, what, according to your experience would happen if you did any better, if you did more than meet your competitors' price. A. Our competitors would meet our quotations instantly.

Q. So the final result would be the same? A. Exactly.

Q. That is, if you both stayed in business? A. Yes, if you wanted the business."[10]

Much testimony was taken on the subject of price reductions and price cutting and the extent of both in this industry. It is digested in Part II, C, 4, pp. 252 to 309, *supra*.

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[9] (C) Tr. 11417-19.

[10] (C) Tr. 6622.

E. Price Bases.

The determination by a company as to whether its mill, or any particular mill which it operates, should be used as a price base mill and how the price base should be arrived at was a matter of business policy for each of the companies concerned and was determined by the executives upon the conditions local to the mill involved.

Testifying as to the elements of competition considered in fixing a price base at a base mill, Bowen, Vice President of Lehigh, said:

> "Q. What method do you adopt for arriving at any figures you use; that is, as your base figures at your mill? A. Well, that is entirely a matter of business judgment. We take into consideration all of the conditions as we find them in the territory with which we are dealing. On the one hand, we want to get as much for our product as we can, and then there are a number of factors that tend in the opposite direction. I can name a few of them.
>
> First, we want to get prices around our mills which, while if possible returning a profit to us, will at the same time make it as tough for our competitors as we can. We like to have prices that will not be so high as to induce the use of competing materials, or prices so high as to encourage construction of new mills in the territory, and, perhaps most important of all, we want the prices that there is some hope that our competitors will respect, because in the last analysis it is competition that determines the price that we can get.
>
> In every case, as I have said, it's just a matter of applying our best business judgment to all the circumstances."[1]

In determining its price base, Alpha strives to provide for a normal profit, but competitive conditions do not permit it to do so. Coogan testified:

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[1] (R) Tr. 26616.

"My testimony was that in setting that base figure, at first we make a price that would include what we consider a normal profit, but that we had not been permitted due to commercial and competitive conditions to set our prices that way for many years."[2]

This subject is amplified in Part II, Section D, 6, pp. 471 to 484 in the evidence on how base prices are determined.

Coogan, Vice President of Alpha, testified that a base mill undertakes price leadership in the territory around the mill, but that this does not amount to control of competitive conditions.

"*By Mr. Wooden:*

Q. You know what competitive conditions are, don't you, Mr. Coogan? A. I know what many of them are.

Q. And you know what your company put in a base for at Bellview, don't you? A. And I told you why we put it in, so we could assume price leadership in the territory from around that mill.

Q. And that is in your mind assuming price leadership, the same as controlling competitive conditions?

Mr. Leisure: Now, I object to that. That can be argued.

Trial Examiner Norwood: I think he may ask him that. Objection overruled.

A. Well, that certainly does not control competitive conditions, having a base, because anybody is free to come into that market and do as they please so far as quoting any prices is concerned.

By Mr. Wooden:

Q. Then I take it that your answer is that you didn't put in a base at Bellview in order to control competitive conditions? A. It may make it easier for us to meet competitive conditions.

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[2] (R) Tr. 25020.

Q. But it wasn't put in in order to control competitive conditions? A. No, you can't—it wouldn't control it.

Q. Or even help control? A. It might be one aid.

Q. Well, will you tell us in that connection what you meant by your letter which appears as Commission's Exhibit 971-18 M, when you wrote Dr. Burns in August, 1935, that you put in the Bellview base in part because it would help in a manner to control competitive conditions in the State of Michigan? A. You will notice that I put a qualifying clause in there, and I say 'help in a manner.'

Q. Yes. A. And I told you that it was one of the aids, but only one of the aids.

Q. Then I take it, when you put in a base at Osborn and Fultonham, that also was an aid in a manner controlling competitive conditions? A. That was our method of trying to meet a competitive condition.

Q. Wasn't it the same situation that is referred to in this exhibit that I just showed you, helping to control them? A. Well, we couldn't control because the man with mills at that point could make his base lower any time he felt like it. The control was in his hands.

Q. But you made it so low that he couldn't very well make it any lower than you without taking a loss on his whole business? A. No, we didn't put it in with that idea in mind at all. We put it in because we felt that that was about the price that they were using in arriving at their destination prices. If we would have put in any other, our prices would still have been higher than theirs.

Q. You assume price leadership when you put in such a base, too, don't you, even though it is at the other mill's location, you assume price leadership there, don't you? A. At the time you put it in, only.

Q. Yes, surely. A. Yes, the next day the man with the mill there could take that price leadership away from you.'"[8]

The reasons for making a base mill are set forth in Part II, Section D, 4, a, pp. 390 to 398.

[8] (R) Tr. 24504-06.

F. B. Warren, Vice President of Bessemer, discussed the competitive conditions created by the location of a number of mills within close proximity to his plant.

"Q. Well, Mr. Warren, would you tell me whether or not you considered the relative location of the mills of your competitors in connection with your determining the policy of whether or not your mill would be a base mill or non-base mill?

* * *

The Witness: Your Honor, I have studied that question pretty deeply for the last 3 years. I have read all this discussion and the criticisms that have been made in an effort to devise some means that I could convince myself would be practical to escape this criticism, and I do not intend this remark to be smart, your Honor, but if there were not any other mills around anywhere we could make our mill a base mill. It would be no problem, and the fact that they are there then forces us to consider where they are and how they affect us.

Trial Examiner Norwood: Well, explain that to us fully, how the condition affects you.

The Witness: You mean how their location there affects us?

Trial Examiner Norwood: Yes, how their location affects you.

The Witness: Could I do that by example?

Trial Examiner Norwood: Certainly.

The Witness: Well, I would like to make this an extreme case to make sure what I mean. If there were not any of them there we could probably get $5 a barrel for our cement. We could sit there like a storekeeper and say 'Come and get it.' Now, we cannot do that and I would not do it if I could. I do not think it would be good business, but the thing that stops us from adopting that sort of an attitude is the fact that there are competitors located at these various points.

Trial Examiner Norwood: Right in—you might say right in your back yard?

The Witness: Well, they are within the area where I feel we have to sell to keep our mill operating.

Trial Examiner Norwood: Within a 25-mile radius?

The Witness: No. That would be contrary to my testimony.

Mr. Withrow: He has testified that there were two which were 10 and 12 miles.

• • •

Q. Mr. Warren, would you just tell us whether or not your mill is surrounded—or, I mean name the basing mills close to your mill? A. I am not just sure about the term 'basing mills.' There is apparently a basing point at Wampum, one at Cleveland, one at Pittsburgh, and one at New Castle. Those are the nearby ones.

Q. And you testified that Wampum and New Castle were about 12 miles away? A. That is right.

Q. And would you tell us whether or not it is a fact that you are surrounded by other mills in addition to the mills which you said were apparently basing mills or basing points? A. Yes. The Diamond mill is something like 80 miles to the west of us.

• • •

A. And the Federal mill to the north and the Lehigh mill up there, too; Universal, Green Bag, West Penn, all within a reasonably close area to our plant.

Trial Examiner Norwood: Within a radius of what? What is the distance of the farthest mill you have named there from your mill?

The Witness: The farthest one is at Buffalo, within 180 miles; the others within 100 miles; such as Painesville.'"[4]

The testimony of other witnesses for non-base mills as to the strictly competitive conditions which determined the decision to operate them as non-basing mills is set forth in Part II, Section D, 4, b, pp. 398 to 409.

J. E. Bates, Sales Manager of Federal, testifying as to the reason why his company did not establish a base at its

[4] (R) Tr. 32075-79.

mill and the relation between price leadership and low base price, said:

> "Q. Well, why don't you have a base at your mill? A. Well, we are trying to get as much money as we possibly can for our cement, and I know if it was left to our own judgment or our own personal feelings, we would like to establish a base very considerably higher than the one that is there today, but we can't —certainly we are not going to put one in that is lower.
>
> Q. Is there any one of your competitors to whom you can point and say that that specific company is the price leader? A. No, I do not believe so. Anybody could be the price leader if they wanted to establish a lower price.
>
> Trial Examiner Norwood: Well, are there a number of them that are so considered more or less price leaders?
>
> The Witness: Well, I do not know. Your Honor, I could not pick out any particular one; as I say, that we could be a price leader this afternoon if we wanted to change our prices, if we wanted to make a lower price in Buffalo. We would lead out, somebody would follow undoubtedly.
>
> Trial Examiner Norwood: Doesn't the size of the mill have something to do with it,—the size of the organization, the financial strength, and so on?
>
> The Witness: I do not see where it would have any bearing whatsoever on it. A small mill could step out if they wanted to, or a large mill; it would not have any bearing on it at all."[8]

Discussing with counsel for the Commission the relation, if any, between the use of basing points in pricing and the survival of inefficient mills, Hogan, President of Lone Star, testified:

> "A. I don't know how you could conceive any pricing method would permit them, if they are inefficient, to survive.

[8] (R) Tr. 30592-93.

Q. All that are in the business are surviving, aren't they, under the present method of pricing? A. After a fashion. Some are living on past earnings, and some are living on depreciation charge-offs. They are not all making money, if that is what you want.

Q. They are not going out of business, are they? A. Not many, no.

Q. Well, some new ones have been built in the past ten years? A. Yes.

Q. Will you answer the question as to whether or not you think that is, looking at the problem from the point of view of the buyer and user of cement, that all such mills as are in existence are entitled to survive? A. I think that it is a matter for the individual mill company, the owner to decide whether they are to survive or not.

Q. But I am asking for your opinion, looking at it from the viewpoint of the public, the buyers and users of cement.

Will you please answer the question from that viewpoint? A. I don't think it has any relationship from the viewpoint of the buyer, and consumer. I don't think cement would be cheaper if several of them went out of the business.'"[6]

On July 29, 1936, Crapo, Vice President of Huron, wrote to Affleck, President of Universal Atlas, in which he referred to a difference of opinion between them as to "fair and sporting competition between cement companies" and particularly as to a price base at Bay City, Michigan by the Wabash Company, apparently dictated by prices charged by Aetna but proving destructive of Huron's interest. The burden of Crapo's letter is that there is no authority within the cement industry to impose rules upon any member and require adherence to conduct believed to be of advantage to all. Specifically he complains of absence of authority in the Cement Institute, saying:

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[6] (R) Tr. 34712-13.

"The problem is—what can Huron do to better its situation? The Cement Association or the Cement Institute have developed no disinterested high priest, or no College of Cardinals, whose word would carry weight as in the case of the Pope to Father Coughlin. In fact, the interest of the Cement Association seems to be limited to the collecting of the greatest amount of dues, which the Association can spend to stimulate the use of cement. They have little interest in the fair play of their members, only in the prompt collection of dues. It would seem that some disinterested Big Brother in the Cement Industry—such a one as Mr. Lober—might smooth this seeming impasse out but no such Big Brother has yet appeared.

The innocent bystander generally runs to a policeman for protection, but the Huron has reluctance in taking such a course without careful thought. What is the best law on which to rely? Before what jurisdiction should the matter be presented? The Federal Trade Commission, or the Court? It would appear that the Industry should be interested in any procedure initiated by the Huron. There probably will come a time when the Huron can no longer take this situation lying down. Its action should then be the wisest for the whole Industry. Independent actions, similar to that made by the Wabash Companies are likely to arise in the future in any locality."[7]

Crapo testified that he had no response to this letter and that he never heard from any official of the Institute suggesting that it would interest itself in the matter of which he complained.[8]

F. The Search for Competitive Advantage.

McKee, Vice President of West Penn, examined as to the possibility of selling cement and staying in business on the

[7] Com. Ex. 418 C.

[8] (C) Tr. 11271.

basis of sales available to him within his area of freight advantage, discussed competition at the out-of-pocket price level. He testified:

> "Trial Examiner Norwood: Do you think, though, that if you contracted for a large volume, at a small price reduction, it would not increase your profits?
>
> The Witness: Well, we never look on any sale from just the standpoint of the one sale. We have to think of its relation to what we are going to do for many years to come, and we, therefore, have to treat a problem from the standpoint of the other factors that relate to it.
>
> Trial Examiner Norwood: Well, in sales in your immediate neighborhood, where others would not have an equal advantage with you, would that same condition prevail, where, say, they could not afford to meet the price, or come lower?
>
> The Witness: We have found, from observation, that prices have been met down what is apparently close to the out-of-pocket cost of production, at least measured by our experience, and the small area to which we have an advantage in freight rate only has an advantage to the extent of a maximum of 4 cents a barrel.
>
> Now, if we reduced our price to 4 cents per barrel above our out-of-pocket cost, which would theoretically be at the out-of-pocket cost of our nearest competitor, we could not expect to continue in business, because we would have all of our overhead and fixed expenses to carry. Therefore, to reduce—experience has shown that you cannot keep anyone out of a territory by reducing the price, unless it goes down to the out-of-pocket cost of the nearest mill, and if we would do that we couldn't continue in business because we would have the 4 cents' freight advantage that we have at our best possible destination, would be insufficient to carry overhead."[1]

[1] (R) Tr. 27943-44.

and further:

• • •

"A. And, hence, if all that we could gain would be 4 cents per barrel above the other man's out-of-pocket cost, and 4 cents per barrel would only be a fraction of the differences between out-of-pocket cost and total cost, because the items of overhead, financial taxes, and so forth, are so heavy in an industry of this type—therefore, there is no way in which we can keep competition out of our closest and most favorable market without putting ourselves out of business.

Trial Examiner Norwood: Well, do you go out into the other fellow's territory and sell at out-of-pocket cost?

The Witness: We sell in the other man's territory at figures below our total cost.

Trial Examiner Norwood: Yes.

The Witness: But in no case at figures below our out-of-pocket cost.

Trial Examiner Norwood: Well, why do you do that?

The Witness: We do that because if we have a certain volume of business, and we can increase that business, well, say, 20 percent, that extra 20 percent will tend to carry these fixed charges of administration, financial, and taxes, which represent the difference between out-of-pocket cost and total cost.

Trial Examiner Norwood: And that does not reduce your profit average?

The Witness: That will—that will reduce our losses, because it will give us a greater volume on which to carry these items of fixed expense.

Trial Examiner Norwood: Well, do you have no points of advantage where the other fellow's out-of-pocket cost would give you a small profit?

The Witness: We do have a small area where the other man's out-of-pocket cost would give us 4 cents above our own out-of-pocket cost, but that would still be a very considerable loss under our total cost.

Trial Examiner Norwood: Wouldn't he get tired of that?

The Witness: Well, I don't know. Experience would seem to indicate that there have been certain sections of the country where prices were low for a considerable period, and the history of bankruptcies in the cement industry speaks for itself. There have probably been more bankruptcies in percentage in the cement industry than in any other single group except the coal industry."[2]

The essential nature of the conflict between the point of view taken by the Commission that a seller should not challenge his competitor's natural advantage and that he should employ his own natural advantage so as to create a local monopoly for himself, and the point of view of the cement manufacturer that he should strive to sell in any market in which he can by any account afford to sell and to fight against action taken by competitors which tends to circumscribe the size of his market, is revealed in the questions and answers in the testimony of Affleck, President of Universal Atlas, as follows:

"Q. Wouldn't you think that the competitor whose mill was so close to the destination that he had a much lower freight rate than another, was a factor to be considered in which one should be normally and naturally lower in that—at that destination? A. If the mill with the lower freight rate is low and—at the point of destination—and the mills that are distant from the point of destination do not meet his price, of course, he gets the business. But if the net return of a remote company is adequate and he meets the delivered price, he may get the business, and that is competition.

Q. Aren't you willing to recognize the competitor that has the advantage over a competitor and is willing to use that advantage, should be the one to get the business? A. Depends on whose ox is gored.

[2] (R) Tr. 27945-46.

Q. Yes, it does. A. I would like him to stay out of my territory, but I wouldn't like him to keep me out of his territory.

Q. But you do not even act yourself, upon the theory when you have an advantage you ought to undersell your competitor at destination, do you? A. I think I am proud to say that, with the exception of a few periods of unusual conditions, we have maintained our price. We publish our price to the world and we stick to it.

Q. To the extent you and your competitors both adhere to their announced base prices and figure freight from the applicable base to destination, any advantages or disadvantages that any of them may possess are all merged, are they not, and offset in that common destination price? A. Well, that is up to the customer to select.

Q. Make a choice? A. The supplier, if he likes the salesman, that may be the consideration, or the service is a little better or he likes the situation. Been a long time customer, maybe. Customers tend to persist with the supplier a long time, hard to pry out. The customer of the dealer and his customers, in turn, have been in the habit of getting a certain colored brand and they would like to keep on.

Q. But all advantages and disadvantages, as far as they reflect themselves in price, are waived out in that common, identical delivered price then, are they not? A. On the contrary, I think it's an advantage in a given locality to be able to get a number of brands from a number of different sources.

Q. At the same—— A. Without paying any premium for any one of—of them.

Q. And at the same price? A. At the same price."[2]

Counsel for the Commission engaged in argumentative questioning of respondents' witnesses as to the distinction between meeting competition and beating it and the peculiar theory that it is the function of a competitor to surrender

[2] (R) Tr. 34940-42.

any advantages he may have over another competitor in order to get a larger share of the business without regard to the effect upon his balance sheet. Thus engaged in cross-examination, Coogan, Vice President of Alpha, testified:

"Q. You say you quote delivered prices because it enables you to meet competition. Aren't you interested in beating competition, or just in meeting it? A. I am interested in meeting the lowest price which I find in any given market.

Q. You are not interested in beating the lowest price that any competitor offers? A. No, sir; I am not.

Q. Is it your conception of competition that a competitor who has an advantage over another competitor, whether in freight or otherwise, should not use that advantage in his price? A. Mr. Wooden, you would not use that advantage very long, because the other man would meet whatever price you make.

Q. Well, regardless of that,—is it your conception of competition not to use an advantage that you have?

* * *

A. I certainly wouldn't want to give away all advantages that we had; I would like to retain some for our own company.

By Mr. Wooden:

Q. Does not competition sometimes require people to give away advantages that they would like to keep?

* * * *

A. I think that is up to each individual to make up his own mind whether that is necessary or not.

By Mr. Wooden:

Q. Well, haven't you had any experience in the cement industry where you have had to give up some advantage, or part of some advantage, because competition forced you to? A. Why, yes, there have been many times where we have had to meet compe-

tition which we did not originate, and which we did not like, but we were forced to meet it.[4]

• • •

Q. And you share your business in Grafton with competitors who are at a freight disadvantage of 14 cents, or more? A. We have no arrangements for sharing business in Grafton.

Q. I mean, you allow them to come in there and take business at the same delivered price that you make? A. Putting the question that way, of course I don't allow them, but they do come in.[5]

• • •

Q. Is it your conception of competition that competitors are not to use an advantage where they have one over other competitors? A. My conception of competition is when I meet the lowest price that I find in any given market, that I have fully met competition.

Q. Well, that is not an answer to the question.

• • •

A. I think I would be displaying poor business judgment if I gave away every advantage that we had.

By Mr. Wooden:

Q. Is that your answer, that your conception of competition is that competitors do not give away advantages, or use advantages that they have? A. I am speaking for our own company in saying that I think it would be poor business for me to give away every advantage that I had.

Mr. Wooden: I submit, your Honor, I have not yet had a direct answer to the question.

Mr. Leisure: Mr. Wooden may not have the answer that he wants, but that is an answer, if your Honor pleases.

Trial Examiner Norwood: I think that he has answered it, substantially."[6]

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[4] (R) Tr. 24340-42.

[5] (R) Tr. 24356.

[6] (R) Tr. 24357-58.

Nebraska had to struggle to hold its trade against the competition of new mills. Hoenig, its Sales Manager, testified:

> "Q. In this questionnaire answer, also Commission's Exhibit 976-4-M, in response to question B(1), you refer to the abandonment of some parts of your territory. Would you look at that answer and tell me what you had in mind there? A. I had in mind that since we started doing business one mill has been located in Nebraska not far from ours, and another mill is located in Wyoming, and I say here: 'In some instances almost to the point of forcing abandonment of parts of our territory.' But it never came to that level.
>
> Q. I see. A. The fact that these plants were placed in the territory, and at first we were struggling for business, made the competitive situation unusually intense. There were times when we were not very anxious to spend very much time and money in soliciting business. We were really interested in holding our trade."[7]

Dannelly, Vice President of National, testified that once his company had abandoned a market it was not possible to recover it, saying:

> "Q. Now, have you in the National Company had the experience of having given up an area in which you had solicited cement, and then gone back into that area again and tried to sell? A. We may have attempted to do so, but we have not found it possible.
>
> Q. Will you explain why that is, just briefly, please. A. Well, of course, in those territories in which the price is so low that it is not interesting, if you withdraw you lose your contact with your dealers and your customers, and if you try to go back in there, why, your competitors have already grabbed them off."[8]

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[7] (R) Tr. 41979-80.

[8] (R) Tr. 39492-93.

On taking an advantage, McGovern, Sales Manager of Hermitage, testified:

> "Q. Well, you would not take advantage of your competitors? A. I have done it many times, Mr. Paulson.
>
> Q. That was not the general practice, though, was it, amongst your competitors to take advantage of each other? A. Now, when you talk about the general practice of my competitors, I am not in position to speak for them."

Brobston, President of Hercules, who has been in the cement business for 39 years, testified:

> "Q. Now, in the long experience that you have been manufacturing and selling cement, what has been your observation: Can you tell us whether there has been and there is competition between companies selling cement in the districts in which you have done business?
>
> • • •
>
> A. There is and has always been extreme competition ever since I have been in the cement business."[10]

Harte, Vice President of North American, testified:

> "Q. You spoke about having 25 or 30 salesmen. Why do you have salesmen? A. Salesmen are our only mode of selling our product.
>
> Q. Trying to get business away from somebody else? A. Well, we have been trying to a long while, and that is the only way we can get business is by solicitation.
>
> Q. Is rivalry still going on? A. There has always been rivalry in my opinion, in the cement business, and probably growing more so today than ever."[11]

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[9] (R) Tr. 36354.

[10] (R) Tr. 26234, 26236.

[11] (C) Tr. 8263.

The insistence of the most favorable terms to the buyer as the condition upon which alone cement can be sold was emphasized by Coogan, Vice President of Alpha, in the following testimony:

> "Q. Now, will you tell us, during your long experience, whether or not it has been your observation and knowledge that your company and your competitors both broadcast your quotations and prices to your dealers and customers? A. Yes, that has been done for more than twenty-five years.
>
> Q. And before I leave that subject, would you say that the same thing is true as to marketing practices, marketing policies? A. Yes, the same thing is true of any marketing policy, and particularly those that affect dealer distribution, because in the cement business the principal factor in the distribution of cement has been the dealer business, and if one company broadcasts a policy which is acceptable or more liberal to the dealers than another policy that one of his competitors might have, you can make up your mind that the other competitors are going to change pretty darn quick."[12]

As to the testimony of manufacturers concerning the necessity of meeting the most favorable conditions offered to dealers see that of Ackerman of Lawrence, Coogan of Alpha, Sweeney of Edison, Blair of Southwestern, Brooke of Monarch, Bates of Federal, Warren of Southwestern, Robeson of Nazareth, MacDonald of Northwestern States, Koch of Lone Star, Bowen of Lehigh, Hartley of South Dakota, Warren of Bessemer, Letzkus of Pittsburg Plate Glass, McGovern of Hermitage, Alexander of Missouri, Elcock of Southern States, Manley of Hawkeye and Nelson of Wolverine, set forth in Part XIV, Sec. G, 6, pp.

As to trying to find something he could afford to offer his customers that his competitors would not offer, Ackerman, President of Lawrence, testified:

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[12] (R) Tr. 23341.

"Q. What do you offer to a dealer that is not offered by your competitors? A. Dragon cement.

Q. Anything else? A. Well, Mr. Paulson, I don't know what my other competitors may be offering. I am using every sales effort that I can think of to obtain business. Now, I imagine the other sales managers are doing the same thing or they wouldn't keep their jobs.

Q. Has it been your experience that you have offered anything to a dealer that is not offered by your competitors, with the exception of the brand? A. Well, I offered a lot of our dealers a lower price one time, but shortly afterwards my competitors followed suit. I extended terms one time, but they followed suit. I wish I could think of something that I could do that they won't match me with that will enable me to get the business.

Q. That is not quite a complete answer to the question.

At the present time, then, are you offering anything that your competitors are not offering, except your brand to your knowledge? A. Not that I know of.

Q. Are all of your terms of sale like those of your competitors, to your knowledge? A. Well, if they are not, I will match the best terms that are out."[13]

[13] (R) Tr. 31323-24.

PART XIX

THE VIEWS OF ECONOMISTS AS TO CEMENT PRICING METHODS AND MARKETING PRACTICES

A. Commission's Economic Witnesses.

Counsel for the Commission called as witnesses five economists—two from the field of agricultural economics—Prof. Edward A. Duddy and Dr. Benjamin H. Hibbard; and three from the field of general economics—Dr. Jacob Viner, Dr. Frank A. Fetter and Dr. Edwin G. Nourse.

1. Professor Edward A. Duddy

Prof. Edward A. Duddy, Professor of Marketing, School of Business, University of Chicago, testified on direct as follows:[1] He had been teaching there for 18 years as assistant professor or professor, and specialized in the study of marketing of agricultural products, having written many books and articles thereon;[2] he received his A.B. at Bowdoin College and an A.M. from Harvard University.[3] (He was duly accepted as an expert in the field of agricultural marketing.)[4]

He knew of no method of marketing or pricing agricultural products in which all producers sell only at delivered prices and refuse to sell f.o.b. shipping point.[5] The typical way of selling grain in the Chicago market is by consignment, being sold after arrival and at the market price.[6] A

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[1] Tr. 15258-339.

[2] Tr. 15259-61.

[3] Tr. 15261.

[4] Tr. 15263.

[5] Tr. 15263-66.

[6] Tr. 15266.

small portion is sold on a "to arrive" bid, which includes cost of transporting to the market. Except when the market is very slow, prices change each moment.[7]

No agricultural products are sold on a basing point plan. When they are sold f.o.b. shipping point, the buyer pays the freight. On consignment sales, the seller pays the freight, and it is deducted from the proceeds.[8] The producer always sells in the market yielding the highest net return, and never accepts different prices for the same commodity at the same time, depending on the delivery point.[9]

He was asked the following hypothetical question:

> "Q. Now, Mr. Duddy, assuming for the purposes of the question that cement is quoted and sold only at delivered prices and that the cement mills or producers do not quote and sell f.o.b. mill; assume that there are some cement mills and groups of cement mills that are basing points and other mills are non-basing points; assume that the delivered prices of cement are the equivalent of basing point price plus rail freight from the basing point to destination and that non-basing point mills match the delivered prices of the basing point mill; assume further that the lowest combination of the base price plus rail freight determines which basing point price will govern particular destinations and that when delivered prices are made in that way the delivered prices of all mills become identical at the same destination; assume that on shipments of cement the freight is ordinarily paid by the buyer, that it is deducted from the face of the invoice, and that the balance is then paid to the seller; assume also that the mill net prices of each non-basing point mill vary among its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from its

[7] Tr. 15267.

[8] Tr. 15268-69.

[9] Tr. 15269.

nearby customers than from its more distant customers; assume further that when selling for delivery at destinations governed by other basing point mills, the mill net prices of each basing point mill also vary between its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from some customers in territory governed by it than by some customers in the territory governed by other basing point mills; take all those factors into consideration and then tell us if there is anything like that in the marketing of any agricultural product, that you know of." (Tr. 15269-70)

He answered that he knew of no similar system in the sale of agricultural products. He disclaimed being an authority on the so-called basing point method of marketing.[10]

Agricultural products move from surplus areas to deficit areas, and shuttle back and forth from one surplus region to another, and surpluses move toward central markets and to the high priced markets.[11] Shippers do not knowingly select a market of lower net return.[12]

He was shown Com. Ex. 2837, an advertisement published by the Cement Institute entitled "Wheat and Cement", in which an analogy is drawn between the marketing of wheat and the marketing of cement. He testified that the comparison is accurate only where there is an agreement to buy on a delivered price basis, such as "to arrive" sales of wheat.[13]

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[10] Tr. 15278.

[11] Tr. 15285-86.

[12] Tr. 15287.

[13] Tr. 15287-88. The advertisement said, in part, as to wheat, "Though raised at different costs and shipped varying distances, it is all sold at the prevailing delivered price. * * * Though all farmers are keen competitors of each other, their wheat must sell at the uniform going price."

There is a difference between the term "prevailing delivered price" as used in this advertisement and the term "uniform going price" as used in the advertisement. The first is a price agreed on by the parties in advance. The other is non-predictable, and is the current competitive market price.[14]

The statement in paragraph 4 of Com. Ex. 2837, "The lowest price becomes the going price" is true as to a uniform product in an open competitive market. The lowest price may or may not be arrived at competitively.[15]

The going price for wheat in the Chicago Grain Market is momentarily changing and unpredictable, while the uniform delivered price for cement is an agreed price, and predictable. A buyer of cement has only one price offered him and has much less bargaining power.[16]

The mere fact that different cement producers get different net returns is not evidence of competition.[17] To the extent that a mill sells in the territory where its base price controls, there is a fair analogy to the seller of wheat, who is always trying for maximum net return.[18]

A single seller of agricultural products "will, under competition, realize the same net irrespective of the market in which he sells. That is, he will sell in the highest market of highest net return."[19]

Agricultural demand for cement in the middle west was not an important factor in demand for cement.[20]

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[14] Tr. 15289.

[15] Tr. 15289-90, 15292.

[16] Tr. 15321-22, 15338-39.

[17] Tr. 15327.

[18] Tr. 15328.

[19] Tr. 15326.

[20] Tr. 15331-32.

Agricultural prices were depressed in July, 1932 and the trend continued downward into 1933.[21]

The distinction between the competitive marketing of agricultural products and the delivered price marketing of cement is the position of the buyer, who has more ability to affect prices in the former, and no comparable bargaining power in the latter.[22] He stated that in so answering he was referring to price competition, and recognized that there are other forms of competition.[23]

On cross-examination he testified:

Due to differences in the nature of the products, marketing of agricultural and manufactured goods have different marketing problems. Weather and perishability affect agricultural products and they are frequently sold on highly organized exchanges, which is not true of manufactured goods.[24] Professional speculators participate in "futures" trading on these exchanges.[25]

Agricultural producers are in far greater number than manufacturers of any product, and this results in so-called "atomistic competition", where you have a great number, a myriad, of producers.[26]

Cement has many of the characteristics that would make marketing on an exchange possible.[27]

A local grain elevator is in a position to take all grain offered. If there is no such inexhaustible demand for cement at any one point, that would be a reason for going to other points to find additional customers.[28]

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[21] Tr. 15331, 15333.

[22] Tr. 15338-39.

[23] Tr. 15339.

[24] Tr. 15341-42.

[25] Tr. 15350.

[26] Tr. 15351.

[27] Tr. 15356.

[28] Tr. 15375-76.

A uniform product tends to have a uniform price at any given time and place.[29] Full knowledge of market conditions facilitates competitive prices.[30]

A farmer may have to sell in several markets at varying nets at the same time. This does not indicate absence of competition.[31]

No one farmer has enough grain to affect the world price.[32]

The marketing system and practices of an industry are largely determined by the geographical distribution of the producing areas.[33]

On redirect, he testified that there is little cross-hauling of agricultural commodities.[34]

On recross, he testified that the price of grain in Chicago is for grain delivered there, but he would not call it a "delivered price."[35]

2. Dr. Benjamin H. Hibbard

Dr. Benjamin H. Hibbard, Professor of Agricultural Economics, University of Wisconsin, testified on direct as follows:[1] He had been teaching there in that capacity for 26 years; he received a B.S. degree from Iowa State College, and a Ph.D. in general economics from the University of Wisconsin; his publications relate to marketing of agricultural products and other farm problems.[2] (He was duly accepted as an expert.)[3]

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[29] Tr. 15378.
[30] Tr. 15381-82.
[31] Tr. 15397-98.
[32] Tr. 15401.
[33] Tr. 15399.
[34] Tr. 15409.
[35] Tr. 15411.
[1] Tr. 15413-76.
[2] Tr. 15414-16.
[3] Tr. 15416.

He knew of no use of basing points in the marketing of agricultural products, no selling only at delivered prices, and no refusal to sell f.o.b. point of shipment.[4]

The same hypothetical question propounded to Prof. Duddy was asked the witness.[5] He testified that assuming that cement was sold as described, there is no such price system in the field of agricultural products.[6]

Wheat prices tend to be identical but not for any length of time.[7] In the local markets there is real competitive bidding. The farmer tries to sell all at the point offering the highest price.[8] He would consider it very curious for a farmer to sell at different net returns at one and the same time.[9] It would be inconsistent with free action of competitive forces.[10]

The farmer's price is the net return to him.[11]

If cement is sold as described in the hypothetical question, the various points of delivery are not markets in the usually accepted sense, because the buyer has no chance to use his skill as a buyer.[12]

Identity of price in a market may be the result of competition or the lack of it.[13]

If identical goods are shipped to a surplus area, there is waste, and an indication that competitive conditions

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[4] Tr. 15417-20.

[5] See *supra*, pp. 2964-65. There were immaterial and slight verbal changes. For the full question, see Tr. 15421-22.

[6] Tr. 15423.

[7] Tr. 15423.

[8] Tr. 15426-27.

[9] Tr. 15430-33.

[10] Tr. 15437-38.

[11] Tr. 15438-39.

[12] Tr. 15442-43.

[13] Tr. 15444-46.

are not working fully.[15] Competition is possible without cross-hauling.[15]

Referring to Com. Ex. 2839 [Cement Institute adv.], he testified that the analogy used was not a true one.[16]

Referring to Com. Ex. 1112 [Lone Star pamphlet re pricing method], he stated that the price described is a monopolistic price; prices are not made by adding up costs.[17]

The sale of cement as described appears to be dumping, i.e., selling at a lower price outside the best territory, to increase sales. Wheat sellers cannot do this.[18]

Mere matching of delivered prices does not suggest genuine competition.[19]

He considered the demand for cement on farms as distinctly elastic. Sales to farmers would increase if prices were dropped in areas near the mill. To resort to cross-hauling is a socially useless expense.[20]

On cross-examination he testified as follows:

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[14] Tr. 15447-48.

[15] Tr. 15448-49.

[16] Tr. 15461-62. Com. Ex. 2839 was an advertisement published by the Cement Institute which stated that just as "water will not flow up hill" and "iron will not float", so there are "economics laws no less variable", one of them being "that any product of a uniform nature tends to be sold at a uniform price".

[17] Tr. 15464, 15470. The Lone Star pamphlet included a statement that the price of its cement is made up of manufacturing, selling and packaging costs, taxes and depreciation, and a reasonable profit, and that this total "which we term our 'Base Price' * * * would constitute the delivered price in every market if we had no competition." (Com. Ex. 1112, p. 23)

[18] Tr. 15471, 15474.

[19] Tr. 15474-75.

[20] Tr. 15475-76.

His specialty in economics had been in the field of agricultural products.[21]

The farmer is interested in the highest price, not in the infinite competition among growers, of which he is an atom.[22] The competition is severe, but impersonal and without consciousness of competing.[23]

The farmer does not know the term "delivered price" but when he ships grain to Chicago, it is literally true that he is selling at a delivered price.[24] The same is true of grain sold to the local elevator, although it is not quoted as a delivered price.[25] It has cost the farmer an estimated 6 or 7 cents a bushel to haul grain to the elevator; now probably less.[26] Prices at local elevators are rarely constant for even two hours.[27]

If a commodity, such as cement, because of heavy freight charges rarely moves over 200 miles from point of production, you would expect many conditions of marketing very different from marketing of wheat.[28] It would not be feasible to sell such a product on a central exchange.[29] The method of marketing agricultural products is not the only proper method or the only competitive method.[30]

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[21] Tr. 15479.

[22] Tr. 15480-81.

[23] Tr. 20619-20.

[24] Tr. 15482.

[25] Tr. 20452-54.

[26] Tr. 20450.

[27] Tr. 15490.

[28] Tr. 20461.

[29] Tr. 20576-79.

[30] Tr. 20459-60.

When local grain elevators are quoting the same price, there is still genuine competition.[31]

Prices of wheat were at one time practically unchanged for three years (presumably referring to prices at central markets.)[32] A reasonably stable price does not indicate the absence of competition.[33] Wholesale and retail milk prices have hardly moved over periods of 6 months to as many years, but there was severe competition.[34] Many prices are stable under severe competition, largely because price is where it belongs, and this does not justify an inference of collusion.[35] Relatively stable prices are advantageous to consumers.[36]

Calculated or "managed" prices, based on costs plus profit, may still be competitive prices. Examples are automobiles, agricultural machinery, and department and drug store goods. Although the buyer cannot influence price, there is still a "market".[37]

A price war may bring price below cost and is usually a bad thing. The public is not benefited by a general collapse of price.[38]

When a mill invades the territory of another, that is competition, and it may be necessary at times to maintain employment.[39] Cross hauling is permitted by lack of competition, but it does not indicate absence of competition, and its presence increases the probability of competition.[40]

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[31] Tr. 20484-85.

[32] Tr. 15511.

[33] Tr. 20560.

[34] Tr. 20555-56.

[35] Tr. 20554, 20557.

[36] Tr. 20596.

[37] Tr. 20462-68.

[38] Tr. 20559-60, 20595.

[39] Tr. 15526, 15559.

[40] Tr. 15591-92, 20479-81.

The witness felt that a cement mill ought to give local customers as good a price as more distant ones, but if the local demand was insufficient to build up a big business, "I'd take less from those outside if I could get away with it."[41] If the local demand is insufficient, it has to go into other territory and sell at an adjusted price not higher than is being asked there.[42]

When wheat is sold in the Chicago market, "price" is the going price there and not what the farmer nets, and the witness has so used the terms in his writings.[43]

Where there are many buyers and sellers, as in agriculture, you have something approximating "pure competition", the terms denoting that no one can influence the market. You cannot have "pure competition" in manufactured goods, and there you have a different type of marketing, but in either case you may have severe competition.[44]

On redirect, he testified that the competitive price in a grain market has substantial uniformity for no length of time; it is not a set price.[45]

Dumping indicates imperfect competition, competition held in check.[46] If mills mutually invade each other's territory, it is due to lack of competition.[47] Dumping tends to decrease total consumption.[48]

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[41] Tr. 15571-72.

[42] Tr. 15582-83.

[43] Tr. 20499, 20505-06, 20507, 20510.

[44] Tr. 20456-58.

[45] Tr. 15588-89.

[46] Tr. 15589.

[47] Tr. 15591-92.

[48] Tr. 15596.

3. Dr. Jacob Viner

Dr. Jacob Viner testified on direct examination as follows:[1] He had been Professor of Economics at University of Chicago for 23 years, teaching price and distribution theory, and theory of international trade and international commercial policies; he holds degrees of A.B. in economics, A.M. and Ph.D. from Harvard; has been special expert and consultant with the U. S. Tariff Commission, and later Special Assistant to the Secretary of the Treasury where he worked on the problem of identical bids on government contracts. He is the author of various books on dumping and prices, and President of the American Economic Association.[2] (He was duly accepted as an expert in the field described.)[3]

Dr. Viner's testimony may be grouped under four headings, (1) dumping; (2) competition; (3) the cement marketing method; and (4) suggested remedies.

a. Dumping

The same hypothetical question purporting to describe cement marketing and pricing was propounded to him that was addressed to previous witnesses[1] and as to whether this corresponded to any competitive method of pricing, he testified that it was analogous to dumping in international trade and to reciprocal dumping.[2] Dumping means discrimination in net prices received according to destination and therefore this is analogous to dumping.[3] It is analogous to reciprocal dumping, since practiced in both direc-

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[1] Tr. 15615-705.

[2] Tr. 15619-21.

[3] Tr. 15621.

[1] Tr. 15621-22. See *supra*, pp. 2964-65.

[2] Tr. 15629.

[3] Tr. 15629.

tions simultaneously, and to regular and systematic dumping.[4] The presence of dumping in international trade indicates monopoly control either by a single seller or an organization of sellers.[5]

Dumping may be belligerent and aggressive and is normally so, if reciprocal, but in this industry it is peaceful, with no desire to break price, but a mere matching of price. This has no parallel in international trade.[6]

If a mill establishes a base price at the mill of a competitor, this would facilitate belligerent dumping by lowering price only in that particular area.[7]

Cross-hauling into each other's markets, if the commodity is bulky and freight costs important is inconceivable except sporadically, unless there is a price practice on the part of both as systematic or regular as the cross-freights.[8]

On cross-examination he testified that "dumping would never be part of my optimum situation; most desired. * * * A resort to dumping might be the lesser of two evils provided it were dumping in one direction and not cross-dumping."[9] Dumping is economically profitable to the country of export, it reduces the market of the country into which the goods are dumped, and it is a form of competition.[10] It is practiced by some American industries, and the object is to secure larger profits.[11] The witness stated "I don't mind that part of dumping which means a higher price at

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[4] Tr. 15632.

[5] Tr. 15633-34.

[6] Tr. 15635.

[7] Tr. 15636, 15638.

[8] Tr. 15639.

[9] Tr. 15716.

[10] Tr. 15720-22.

[11] Tr. 15721-25.

home."[12] To constitute cross-hauling or dumping, the cross shipments must occur at the same time and not months apart. Also, if the cements are of different color, or if the buyer has a preference for a particular brand the shipment would not be cross-hauling (dumping). All instances of freight absorption are not cross-hauling (dumping).[13] Without competition there would be no cross-hauling; "a complete monopolist who had any sense would eliminate cross-hauling".[14]

"I would expect to find it (cross-hauling) in any industries which sell on delivered price basis and which have market areas having boundaries at which their delivered prices are equal to delivered prices of some other mills elsewhere located and who, nevertheless, solicit business outside their market area."[15] Its elimination would mean more price competition, even if it left only one seller in each area, but its sudden elimination, in the absence of governmental compulsion, would indicate agreement or collusion.[16]

b. Competition

On direct Dr. Viner testified that the pricing method in cement described in the hypothetical question[1] differs from a competitive price structure in that sales are regularly and systematically made at prices yielding different nets according to the location of the buyer, and also there is a practice of following a leader and meeting his price instead

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[12] Tr. 15717.

[13] Tr. 15785-88.

[14] Tr. 15790.

[15] Tr. 15796-97.

[16] Tr. 15805.

[1] Tr. 15621-22.
A substantially identical question was asked Prof. Duddy. It is set forth in full, *supra*, pp. 2964-65.

of each seller contributing to price formation. However, there is a resemblance between them (*i.e.* between the pricing method described in the hypothetical question and a competitive price structure) in that all sellers deliver at a uniform price at any one point. Under price competition this uniformity would be approximate or close, whereas in the absence of such competition the uniformity may be absolute or perfect.[2]

No industry remains competitive if it knows how to get out of it and the fewer the producers, the easier it is to escape.[3]

Price competition is the form that is most beneficial to the national economy, and it includes any differences in service which have an advantage to the consumer.[4]

"Price competition * * * is not the only but almost the only competitive aspect of business men which is, in my opinion, serviceable to the community".[5]

"Absolute and complete identity of price is a phenomenon which could never spontaneously arise from individual activity. Under the fullest and freest competition, there would be a very strong tendency for approximating prices * * * and strong enough to prevent marked deviation, but the complete identity or uniformity of prices * * * always reflects managed competition in some sense." Under full price competition, the identity would be in the prices received at the mill.[6] "Where the buyer is free to choose as between sellers at the same point, there cannot persist substantial differences in price."[7]

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[2] Tr. 15688-89.

[3] Tr. 15700-01.

[4] Tr. 15640.

[5] Tr. 15750.

[6] Tr. 15643-44.

[7] Tr. 15674.

Active price competition means a moving price in response to changes in supply and demand.[8]

On cross-examination, he testified that if a plant is not fully employed, he would expect price to be reduced; "he would have no alternative in a fully competitive industry".[9] He would expect other mills to respond by cutting price, and the first would have to cut price further and keep on cutting, producing a price war, cutthroat competition. That is the inevitable result of complete competition.[10] He would not expect a rational business man who had experienced such reductions leading to price wars to embark on such reductions likely to have such a result.[11]

A "fully competitive system" is the least wasteful type of economic organization; any change in supply or demand changes price, and there would be no idle resources except seasonal or occasional.[12]

A "fully competitive" industry is one in which price drops whenever orders are less than the comfortable capacity of producers. Also there must be a substantial number of producers so that what one did would not be of substantial concern to any other producer.[13] There is no such complete competition in any important industry today, but it would exist in agriculture, mining and transportation if the Government permitted.[14] Wheat is very nearly a "fully competitive" industry.[15]

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[8] Tr. 15655.

[9] Tr. 15755-56.

[10] Tr. 15756-57.

[11] Tr. 15757-58.

[12] Tr. 15789-93.

[13] Tr. 15815-16.

[14] Tr. 15791.

[15] Tr. 15817.

Competition includes all activities of rivals to increase profits. An industry may be highly competitive but not engage in price competition.[16] However, price competition exists when quality is improved without change in price.[17] Dropping price to meet the lower price of a competitor is not price competition but it is price competitive behavior.[18] "That is a gesture in the direction of competition". "Competition is an activity of businessmen stretching over a period of time".[19]

"Approximate identity of price to buyers at the same point is consistent with complete competition; also with complete monopoly."[20] But when delivered prices become absolutely identical, "price competition would be non-existent or very partial. * * * That point will not be reached under competition".[21] If a competitor drops and sells at another producer's price "it is a gesture in the direction of competition but not sufficient to characterize their behavior genuinely competitive".[22]

As to price, "I could not explain the continuance of two different prices in the same market if there was real competition".[23] For a standardized commodity "I would expect to find a substantial degree of uniformity of price with respect * * * to the prices that different buyers located at the same points are paying at the same time".[24]

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[16] Tr. 15749-50.

[17] Tr. 15751.

[18] Tr. 15758-60.

[19] Tr. 15765-66.

[20] Tr. 15752.

[21] Tr. 15753-54.

[22] Tr. 15765.

[23] Tr. 15762.

[24] Tr. 15812-13.

But he also testified that if at the same time or over a substantial period of time "You have got the same price offers from any potential seller you went to, I would say • • • that was, to me, the sign of the existence of arrangement and not of competitive price behavior."[25]

Prices do not change frequently during the day on most manufactured goods, but if competitive, you would expect that price should change twice a year. But prices are more variable than they seem from published price lists, which are much more rigid than actual prices.[26] The witness admitted having written an article in which he said that whether prices of cement change as frequently as prices of other standardized commodities "is a good test, perhaps the best single test, of its competitive character of prices".[27] Frequency of price changes will correspond very closely to the degree of competition, but a very competitive industry may have prices that do not reflect great flexibility if the commodity is bulky and a large part of price is freight costs, when freight costs are rigid.[28]

On re-direct,—

With reference to the increase of 40¢ a barrel during July 1932, he testified that "a substantial increase in price at that time was inconsistent with the existence of a freely competitive market".[29]

c. Cement Marketing Method

On direct. Dr. Viner testified,—this marketing method (as described in the hypothetical question) provides an umbrella for the badly located plant, and lessens the pen-

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[25] Tr. 15825.

[26] Tr. 15746-48.

[27] Tr. 15809-12.

[28] Tr. 15745-46.

[29] Tr. 15993-95.

alty of making a mistake as to the size of a plant, and thus may lead to excess capacity.[1] This marketing method "cannot be explained in terms of deliberate choice from among available alternatives."[2] It could not arise fully and spontaneously as a result of competitive forces; "certain of its elements would have to be planned", and to maintain it, "there would have to be some disciplinary machinery", and the actual or potential installation of a base price at a mill of a competitor, "could be made to serve as a disciplinary tool".[3]

Under this marketing method "the practice was one under which prices were met according to an accepted pattern, but in which each individual mill or producer participated not at all in the process of price formation, or participated, if he was a leader, * * * in the process of price formation only for that particular area and accepted prices otherwise set and interfered with them not at all in other areas."[4] "The function of basing-point is to meet a situation where a postage stamp situation is impossible because the commodity is too bulky", and "to have a regular pattern known to the industry so that the task of maintaining leadership is not beyond the industry's powers".[5] "Leaders are easily recognized and their leadership can be accepted, so that there will be meeting of prices, matching of prices, but no genuine price competition except * * * through shifts in relative base prices".[6] As to the practice of price leading and following, "that, I

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[1] Tr. 15695-96.

[2] Tr. 15702-03.

[3] Tr. 15664, 15666.

[4] Tr. 15634-35.

[5] Tr. 15658.

[6] Tr. 15657-58.

may say, is not my understanding of a price competitive practice".[7]

If the differential between base prices was constant over a long period, that would be a rigidity inconsistent with active price competition.[8] The maintenance of the same base prices at various points respectively since 1933 shows that there was no price competition between the mills located there.[9] Rigid prices are an important factor in explaining slowness of a recovery from a depression and its intensity.[10]

If a mill has two base prices, one effective to a state line and the other beyond it, and these are followed by competitors, that demonstrates an understanding that a leader was to be followed as to price in a certain area.[11]

The method of pricing cement is not a way of "meeting competition" if that means price competition. "I would say that it is a system of matching prices to avoid competition".[12] "Equality of delivered price at a particular location is essential for all who are to participate and actually make sales there"; it is "a matched price, a leader's price".[13]

As to what constitutes "price", the commodity must be defined and also the place of sale. If sold at delivered prices, "if you ask me what is the price, then I would say there is a mill net price, and there is also a delivered price".[14] "A seller can sell at his mill or he can sell de-

[7] Tr. 15676.

[8] Tr. 15646-48.

[9] Tr. 15654-56.

[10] Tr. 15695.

[11] Tr. 15644-45.

[12] Tr. 15640-41.

[13] Tr. 15664.

[14] Tr. 15676-77.

livered, * * * and he would quote different prices according to the conditions and terms of sale. They would all be prices".[15] But in analyzing the question of dumping and price discrimination, the only usable definition of "price" is the price at which the buyer can get it at the mill.[16]

With reference to the submission of identical bids to State highway commissions, he said that he could not reconcile that with genuine price competition, and that it indicated that there was "an accepted pattern with respect to price behavior of a sort that eliminates ordinary types of price competition * * * and machinery of some sort for making known * * * the last minute price of every other operator * * *."[17]

An industry operating as described involves an economic waste to the national economy, which tends to be borne by the consumer.[18]

The basing-point system "lessens the penalty on anyone who made a mistake with respect to the location of his plant" or "with reference to the size of his plant, and thus may lead to excess capacity * * *. In fact, you would expect the normal situation in an industry in which there is no, or very little price competition, to be an industry normally characterized by plants operating only at a fraction of capacity, maybe a large fraction".[19]

When an industry such as agriculture operates under fully competitive prices, and is in an economy in which it buys at prices not competitively determined, the economy is half slave and half free, this causes losses, deepens and lengthens depressions and causes most of our economic trouble.[20]

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[15] Tr. 15678.
[16] Tr. 15679.
[17] Tr. 15648-52.
[18] Tr. 15695.
[19] Tr. 15696-97.
[20] Tr. 15698-700.

As to this marketing method, "I have not been able to see how you could design any worse one, from the point of view of national economy, assuming you have free choice".[21]

On cross-examination he testified that if there is secret price cutting in the industry, that is competition, even though it involves discrimination.[22] He assumed in his answers on direct that large numbers of price cuts did not exist. If they do exist, "my answer would have been different".[23]

He also testified that if it had been stated that mills also sell very frequently on an f.o.b. mill basis and that few mills had even consistently refused to sell f.o.b. when asked, that would have changed the question "very importantly."[24]

Making a silo a basing point, if object was to make the area less attractive to mills elsewhere, "would be an act of price competition".[25]

Market leadership is a very common phenomenon in manufacturing industry. "It is frequently the cause of identical prices".[26]

On re-direct, he testified, when asked whether mill net is "price" in this industry, "If the commodity sold is cement as of that mill, then I would say that mill net is price".[27]

d. Remedies

On cross-examination, Dr. Viner testified that leadership should be prohibited if some superior alternative is set up.

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[21] Tr. 15703.
[22] Tr. 15783-84.
[23] Tr. 16035, 16037.
[24] Tr. 15896-97.
[25] Tr. 15862-64.
[26] Tr. 15778-79, 15781-82.
[27] Tr. 15995-96.

"I would abolish both the leader and the follower."[1] He would substitute increased degrees of setting the pattern by Government, "and the odds are pretty nearly that the Government * * * will make mistakes and will set a vicious pattern".[2]

If the witness were designing the price structure of an industry having relatively few producers, "I would recognize that in that industry you cannot get the pattern of full competition."[3] "The best that is conceivable is not obtainable if those conditions exist".[4]

4. Dr. Frank A. Fetter

Dr. Frank A. Fetter, retired Professor of Economics, Princeton University, testified on direct as follows,[1]—He first taught as an instructor in economics at Cornell, and later as professor at Indiana University, Stanford University, Cornell University and finally at Princeton, having taught there since 1911. He holds a Ph.D. from the University of Halle. He was for five years secretary and treasurer of the American Economics Association, and was its president in 1912. He had written several books on general economics and economic problems, a volume known as "The Masquerade of Monopoly," dealing with the basing-point problem. He had devoted himself to a study of monopoly and monopoly practices and basing-point, and was associated with others as an economic advisor for the associated states opposing "Pittsburgh Plus" in the *U. S. Steel* case, and testified in that case.[2] (Over objections of respondents, he was duly accepted as an ex-

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[1] Tr. 15781-83.
[2] Tr. 15783.
[3] Tr. 15844-45.
[4] Tr. 15847.
[1] Tr. 17634-776.
[2] Tr. 17634-37.

pert in the general field of economics and with special regard to basing-point systems.)[3]

He testified as follows upon the subjects stated,—

a. The Marketing Method in Cement

A hypothetical question purporting to describe the marketing method in cement was propounded to the witness, and since it contains a number of slight variations from the similar questions propounded to previous witnesses, it is here set forth in full,—

> "Q. Assume that there is a general practice in the cement industry of mills quoting and selling only at delivered prices and of refusing to quote and sell f.o.b. mill.
>
> Assume that some mills and some groups or clusters of mills are basing points and that some other mills are non-basing points.
>
> Assume that delivered prices are the equivalent of base-point prices plus rail freight from base point to destination and that the lowest combination of base price plus rail freight determines which base-point price will govern at any particular destination.
>
> Assume that when delivered prices are made as described the delivered prices of all mills become identical at the same destination and that non-basing-point mills match the delivered prices at particular destinations of the basing-point mills.
>
> Assume that rail freight is ordinarily paid by the buyer to the railroad company; is then deducted from the face of the invoice and the balance paid to the seller.
>
> Assume that the mill nets of each non-basing point mill vary between its respective customers depending on the differences in freight to their respective destinations, higher mill nets being received from its nearby customers than from its more distant customers.
>
> Assume, also, that when selling for delivery at destinations governed by other basing-point mills

[3] Tr. 17637-38.

the mill net prices of each basing-point mill also vary between its respective customers depending on the difference in freight to their respective destinations, higher mill nets being received from customers in territory governed by it than from customers in territories governed by other basing-point mills.

Assume, also, that substantial shipments are being regularly made by basing-point mills into the territory governed by other basing points.

Take all of those things together and then tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which you have become familiar in the course of your studies and experience?"[1]

As to this marketing method as described, the witness testified, "I should say that it did not conform to normal competitive methods."[2] "The economist puts up a picture of a typical competitive state of affairs, market, where competitive prices result, and this hypothetical question does not present such a situation."[3] This is a scientific ideal never fully realized, but "in our organized markets for stocks, securities and produce and physical products, they are very closely approximated."[4]

On cross-examination he admitted that in answering as to this hypothetical question, he gave no consideration to the following,—consumption figures; shifting location of demand; location of mills with reference to large consuming areas; fluctuation of delivered prices; varying seasonal demands; capacity of mills and relation to demand; overhead costs; extent of employment; technological improvements; varying costs in relation to volume of production; average distance of shipments; extent of cross-hauling; number of mills in various areas; or to ratio of

[1] Tr. 17639-41.
[2] Tr. 17645.
[3] Tr. 17648.
[4] Tr. 17689.

profit to fixed investment.[5] "I was not answering as a factual witness."[6] He admitted that if it is true that buyers generally have demanded delivered prices, that might have changed his answer to the hypothetical question.[7] Also that if the question had included the statement that some cement is sold f.o.b. mill to buyers and to the Government, that would substantially change the question, and would materially change the operation of basing-point.[8]

b. Definition of "Price"

Dr. Fetter testified on direct that under the description of the method in the hypothetical question, "there is no price in the ordinary economic sense; you are using the word 'price' in a different sense." "The word 'price' as applied to a market * * * is a freightless price. * * * The word 'delivered price' is a compound term meaning both the price of the cement and the price of the freight. * * *"[1] "The price of cement is the amount paid by the buyer for cement, because a delivered price is the price paid for cement and freight combined."[2]

On cross-examination, he agreed that "price" has a meaning only when related to a specific time and place for transfer of title.[3]

The President of Superior wrote to Dr. Arthur R. Burns, an economist then engaged in a study of cement marketing, on July 26, 1935 and said in part:

[Italicized part quoted in Fdgs. Par. Twenty-four (e)]

"* * * *This freight rate of course, does not in any way accrue to us and the net price for our cement at such a delivery point, in fact the only price that is*

[5] Tr. 18187-96.
[6] Tr. 18219-20.
[7] Tr. 18250.
[8] Tr. 18478-79, 18483.
[1] Tr. 17656.
[2] Tr. 17660.
[3] Tr. 18250, 18387.

of any advantage to us, is the cement price stripped of freight, package and discount, which of course in my own mind becomes the selling price so far as we are concerned. This condition does not prevail at all plants, of course. We attune our minds to a price on portland cement which is always a delivered price less our freight, package and discount." (Com. Ex. 971-17 P)

c. Definition of "Market"

Dr. Fetter testified on direct that under the basing-point system of identical delivered prices "there is no market in the economic sense." A market is "a place where buyers and sellers can freely come together and where there is independence of action on the part of the seller; where the bids and offers are independently made, and where we have a market price arrived at by the independent competitive action of the various traders in the market."[1]

On cross-examination, he testified that a market has to be an actual place.[2] An isolated sale at one point does not make a market, but so far as there is a market, it is at that point.[3] There are five essential conditions of a true market, —freedom of access; common knowledge of kinds and quantities; freedom of competition; a two-sided market, *i.e.*, many buyers and sellers; and capacity to perform. With these five essentials you have effective competition.[4] The competition is more effective with a large number of sellers.[5] The most nearly perfect markets we now have are the produce markets.[6] In the old English and early American markets, transportation was a past fact, a cost, before the goods were offered, and was borne by the seller, who would

[1] Tr. 17722.
[2] Tr. 17930.
[3] Tr. 18340-41.
[4] Tr. 17904-13.
[5] Tr. 17934.
[6] Tr. 17954.

take this cost into consideration and try to recover it.[7] If nearby sellers had little or no transportation expense, he would have to meet their lesser price. "He would have to meet the price * * * to keep from being cut out of a sale." This reduction in price would not lessen the competitive character of that market.[8] He also agreed that these five conditions of true markets are necessary for "perfect competition."[9]

d. Uniform Market Price

Dr. Fetter testified on direct that there is unanimity of economic opinion that with a standardized commodity under conditions of effective competition, there is the strongest kind of tendency to uniform price.[1] "It is the general consensus that in a typical market, at a definite local place, without inclusion of freight, that the rule holds that there is a tendency toward uniformity of price in that market."[2] This statement has essentially no application to a basing-point system of delivered prices "because it conceives of a state of facts, situation, that is utterly different from that in a basing-point system."[3] "In the economist's typical or ideal market all buyers and sellers of that region are gathered together, * * * they can become acquainted with the price, they can and all do buy at substantially the same price, and there is a tendency for the price in that market to be uniform * * * for all buyers."[4] "The picture is very different from that presented * * * under the basing-point system."[5] Among all economists, the discussion as to iden-

[7] Tr. 17956-58.
[8] Tr. 17959.
[9] Tr. 17956.
[1] Tr. 17669.
[2] Tr. 17710.
[3] Tr. 17686.
[4] Tr. 17686.
[5] Tr. 17687.

tical price is with reference, not to delivered prices, but to definite local prices in a local market.[6] In such market, uniformity of price, as a tendency, will inevitably result from active, free and unrestrained competition.[7]

On cross-examination he testified that when the five essential conditions of a "market" are present, with competition taking place, you expect a uniform market price to result. "That is general economic doctrine."[8] Mere uniformity of price is consistent with either a real competitive situation or a monopolistic situation.[9]

On re-direct he testified that his statement that uniformity of price was no evidence of competition or monopoly was not applicable to identical delivered prices under the basing-point system.[10]

e. Basing-Point and Competition

Dr. Fetter testified on direct, "My opinion of the whole system is that it is not a competitive system."[11] Asked as to how competition could be evidenced, he testified that if a mill's territory is invaded by another mill, it could reduce its mill price or the price on the sale it is about to lose, instead of just matching price.[12] "If they would run to capacity at very much lowered prices, they would come out better in the long run.[13] "In the basing point practice there is little, if anything, that can be called price competition, but there is a certain sort of price-raising competition, * * * in

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[6] Tr. 17712.

[7] Tr. 17718.

[8] Tr. 17934.

[9] Tr. 18156.

[10] Tr. 18557-58.

[11] Tr. 17735.

[12] Tr. 17744-45.

[13] Tr. 17773-75.

selling, competition in the sacrifice of mill nets, in order to reach distant points, and so forth, none of which * * * result in lowering the price paid by the consumer.'"[4] There is no permissible competition in price, and this results in competition in the form of high selling costs, of no substantial gain to the community.[5] Basing-point cannot exist or be maintained by independent competitive forces, or as an expression of supply and demand. "It is of the essence of basing-point practice that there is cooperation and tantamount to an agreement. It requires a mutuality of behavior.* * *" A mill refrains from reducing price to prevent raids into its territory, and permits the outsider to match the governing price there.[6] "It is a fallacy to say that in basing-point, when you match the lowest price quoted at destination, you are meeting competition. Matching prices is not competing. If a man matches your price and takes away part of the business, you are not competing if you allow him to."[7]

On cross-examination, he said that when a mill invades the territory of another, the latter, if it values these customers, will try to hold them by giving them a price that keeps them. If a mill passively accepts invasion, it has given up active competition.[8] It would be competition if a mill quoted a lower delivered price.[9] If a new mill starts at a distant point as a non-base mill, that does not indicate a lack of competition or indicate collusion. If it becomes a base mill, it can do this without collusion, and this would be an indication of its independence.[10] If American

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[4] Tr. 17739.

[5] Tr. 17763.

[6] Tr. 17755-57.

[7] Tr. 17732-36.

[8] Tr. 17988-91.

[9] Tr. 18394-97.

[10] Tr. 17986-88.

mills and importers of foreign cement should quote the same price in New York, that would raise a grave suspicion of collusion.[11]

f. Effects of Basing-Point

Dr. Fetter testified on direct examination that sudden and unpredicted changes may take place in base points being put in where they were not before, or taken away; "thus the industrial fortunes of all * * * are put at stake, at the hazard of some individual choice rather than of impersonal economic forces."[1] Basing-point affects the location of secondary industries using the product.[2] Basing-point is not in the long run in the interest of the industry, and it is not in the public interest.[3] There is a tendency toward uneconomical location.[4] When price is artificially controlled and can be raised above a normal rate of profit, the higher profit tends to create excess capacity.[5] The isolated position of a mill creates in itself a monopolistic situation; the real question is how this is exploited; and under basing point it is exploited as fully as the industry can do it.[6] The basing-point system is wasteful because of the enormous amount of cross-hauling. Waste is not good public policy or good economic policy.[7] Basing-point is not in the public interest.[8] Basing-point results in a temptation to excess

[11] Tr. 18143.

[1] Tr. 17763.

[2] Tr. 17770-71.

[3] Tr. 17775-76.

[4] Tr. 17771.

[5] Tr. 17772-73.

[6] Tr. 17753-54.

[7] Tr. 17759-60.

[8] Tr. 17775-76.

capacity; the mills all feel that the continent is their market.[9]

g. Price-Cutting

On cross-examination, the witness testified that there is a unanimous agreement among economists that secret discrimination is a bad thing for the industry and for the community.[1] If mutual reductions in price keep on until price is below cost, that is competition, but not socially desirable; it is cut-throat competition, and is one way to produce a monopoly.[2]

h. Rigid and Flexible Prices

Dr. Fetter testified on direct that prices in a typical economist's market tend to be fairly flexible over a period of time.[1] If certain basing-point prices were not changed from January 1933 to June 1938, "such rigid prices would be taken by any economist as indicating a lack of normal or usual competitive forces at work."[2] "Even rigidity of a few months would be very extraordinary in any industry where there were competitive conditions."[3] The price rise of 40¢ a barrel in July 1932 at the depth of the depression "would seem to be an extraordinary phenomenon," indicating a power of control over prices, even though basing-point prices prior thereto were abnormally low.[4]

On cross-examination he testified that from January 1933 to June 1938, he would have expected prices to rise as

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[9] Tr. 17763.

[1] Tr. 18075-77.

[2] Tr. 18397-98.

[1] Tr. 17689-90.

[2] Tr. 17693-94.

[3] Tr. 17695.

[4] Tr. 17695-96.

demand increased; this failure to rise indicates a lack of normal competitive forces.[5]

i. "Freight Absorption" and Discrimination

On direct he testified that in considering any question of discrimination, price would be the net realized price obtained.[1] Absorption of freight saves nothing to the buyer, and results in geographical dislocation of secondary industries.[2] If less than 50% of a mill's sales are at their own base price and the rest at lower nets, some 60¢ or 70¢ lower, that indicates that the base price must be decidedly high to permit this.[3] Discrimination in mill nets "is the exploitation of a monopolistic power which enables the seller to discriminate between different buyers."[4]

At every non-basing point mill "phantom freight is paid by all of the people nearest to the source of production".[5] The ability to charge phantom freight "is, of course, exploiting its monopolistic power within that area."[6]

On cross-examination, he testified that it is better that a seller stay out of a market and not meet a lower price, if this is accompanied by sales elsewhere at a greater net return.[7]

In "postage stamp pricing" (uniform price over the continent or a large area, as used by the Post Office), such

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[5] Tr. 18167-68.

[1] Tr. 17701.

[2] Tr. 17762-63.

[3] Tr. 17751.

[4] Tr. 18518.

[5] Tr. 18227.

[6] Tr. 18529-30.

[7] Tr. 17977.

sales in strict theory involve discrimination, but everyone is satisfied, and no social problem of importance arises.[8] Basing-point is in one thousand or more industries.[9] Cross-hauling amounts to a tax on the ultimate consumers.[10] The witness had not studied factually the average length of current freight hauls, or the per cent. sold at a distance, or the ratio of cross-hauling.[11] There is a relation between the amount of cross-hauling and the amount of base prices. The higher the base prices, the more you can absorb freight without getting a net of zero.[12] The fact that other mills invade the territory is an indication that the base price is high.[13] Sales by a Fuller Brush man at your door are delivered prices, and if the goods are shipped to you from the factory, some sales net more than others.[14] If delivered prices in cement have developed as a matter of the buyer's preference, they ought not to be prevented; the same is true if the Government or the states have requested delivered prices.[15] But the witness believed it is untrue that cement buyers have generally, for 30 years, demanded delivered prices.[16]

j. Overhead Costs

On cross-examination, Dr. Fetter testified that the overhead costs of a product like cement are very substantial.[1]

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[8] Tr. 18058-59.

[9] Tr. 18125-26.

[10] Tr. 18461.

[11] Tr. 18468.

[12] Tr. 18531.

[13] Tr. 18553.

[14] Tr. 18056.

[15] Tr. 18254.

[16] Tr. 18249.

[1] Tr. 18021.

He admitted that economists assume that additional units can be produced at less costs.[2] He admitted that the importance of heavy overhead costs is not mentioned in his book on basing-point entitled "Masquerade of Monopoly."[3]

k. Non-Base Mills

On cross-examination he testified that the extra amount received by a non-base mill equivalent to freight is termed "phantom freight", as far as it exceeds actual freight. Non-base mills have monopoly power. They are located at a distance from other mills, and do not sell to nearby customers at a uniform price equal to the realized price at the geographical margin. They are exercising this monopoly power.[1] Raising a base price of a mill is moving in the direction of becoming a non-base mill, and if a base price gets high enough, the mill ceases to be a basing-point in fact.[2]

l. Maintenance of Basing-Point

Dr. Fetter testified on direct that concentration of capacity and a number of mills in a few large companies would greatly facilitate the maintenance of the basing-point system.[1] "I could not say that, abstractly, a basing-point system might not be maintained by completely independent single mills, but certainly the maintenance of that or any other system of pricing adopted by an industry is greatly facilitated by such concentration of ownership".[2] "Any

[2] Tr. 18041.

[3] Tr. 18181-82.

[1] Tr. 18528-29.

[2] Tr. 18532.

[1] Tr. 17745-46.

[2] Tr. 17746.

system of pricing has to be policed. * * * An artificial system of pricing such as the basing-point system has to be policed by the industry and very evidently, the concentration of ownership and great financial power enables that policing to be done much more effectively and easily." It would probably facilitate both price enforcement and price agreement.[3]

m. Sealed Bids

He testified on direct that if sealed bids at 100 destinations are identical, such identity is inconsistent with the conception that each destination is a separate market.[1] However, when basing-point is in vogue, everyone knows, after a short time, what the price at each destination will be, until a change in some base price occurs, which may be rare, or until some change in freight rates.[2]

On cross-examination he testified that if bids to a state are f.o.b. mill, the award will be on the lowest destination cost.[3] In all industries, "I think that most competitors or all true competitors who are not conspiring or consulting have to make shrewd guesses as to what the bid of others will be, especially, of course, in sealed bids."[4]

n. Monopoly Power

Dr. Fetter testified on direct that the isolated position of a mill creates in itself a monopolistic situation; the real question is how this is exploited, and under basing-point it is exploited as fully as the industry can do it.[1] When shown

[3] Tr. 17747.

[1] Tr. 17729-30.

[2] Tr. 17725.

[3] Tr. 18281-83.

[4] Tr. 18494.

[1] Tr. 17753-54.

the Lone Star pamphlet (in which Lone Star describes how its base price would be calculated at costs plus reasonable profits on investment, and states that "that base price plus the transportation charges would constitute the delivered price in every market if we had no competition"),[2] the witness said that "on the face of it the statement admits that it is a monopolistic price, because it is a price made if they had no competition".[3]

On cross-examination he testified that the answer last above quoted was based on the assumption in the statement that there was an absence of competition.[4]

If there is only one seller at particular point, he has a limited monopoly.[5] Charging what the traffic will bear is a general monopolistic principle.[6] It is economically wrong to have monopolistic situations if it is possible to make them less so. A uniform base price would make the behavior more closely resemble that of a competitive market.[7]

o. Remedies

Questioned in cross-examination, as to what he believed should be done, Dr. Fetter testified that restricting the manufacturers to those points at which, with a single mill price plus freight, they can quote a price less than that of any other manufacturer might be sounder than the present practice.[1] It would mean that in many instances, the buyer would have no choice except to buy from a single seller.

[2] Com. Ex. 1112 at p. 23.

[3] Tr. 17751-52.

[4] Tr. 18177.

[5] Tr. 17899-900.

[6] Tr. 17946.

[7] Tr. 18515.

[1] Tr. 17944.

The limit of price would still be what the traffic will bear, plus price competition on the border.[2] It is better to have only a single seller than to have this geographical discrimination in prices.[3]

If a single mill changed over to the proposed basis, and the others did not, it would lose business and would be ruined if the others were stronger financially. This loss would cause him to return to his original method of selling. The witness would not expect a producer to make such a change unless it yielded him an advantage.[4]

Under his proposed uniform f.o.b. method, the witness would expect to see new mills at various points because of the present geographical misplacement. While he would not wish to see the present excess capacity increased still further, it might be a choice of evils.[5]

Under such a system of uniform f.o.b. mill prices, if there were two mills at one point, they would have the same market area, and they would not sell at different prices in this area. If either reduced its price, the other would be compelled to if it was to secure any business there.[6] An exception would be if one mill were sold out to capacity. Otherwise the change would have to be met promptly. So under these conditions, the witness would expect to find identical prices at each point in that market area, but without "freight absorption".[7] The delivered cost would be the same as the delivered price if the buyer bought at the mill and transported it by rail to his destination.[8]

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[2] Tr. 17945.

[3] Tr. 17978-79.

[4] Tr. 18013, 18014.

[5] Tr. 18020-21.

[6] Tr. 18060-62.

[7] Tr. 18064.

[8] Tr. 18066.

Under such an f.o.b. mill method, there would undoubtedly be peaks of local demand, and if the capacity of the local mill was insufficient to meet these, the excess would be secured at a distance at a higher price unless the distant mill reduced its price.[9]

When asked for a list of industries that sell at a uniform f.o.b. mill price, he answered, "No, I wouldn't undertake to do that. * * * All mills that sell f.o.b., all industries that sell f.o.b. mill."[10] Later he stated that he had been informed that the milling industry is an example.[11]

Under such a uniform f.o.b. mill method, the only competition would be at marginal points between two market areas,[12] and there the delivered prices would be exactly equal, because, by definition, that is what the marginal point is.[13] He assumed that there is some demand at such a point, and if there is no demand at the marginal place, then there would be no competition of any kind between these two mills, and each would be a limited monopolist.[14]

A foreign cement mill, the witness testified, has a natural market area, just as do domestic mills, and if a Belgian mill's price plus ocean freight to New York is lower than the American price there, then New York is part of the Belgian mill's market area, and the witness would favor restricting the American mills from competing in the New York area, and similarly as to other ports.[15] This competition would be a very healthy influence to control domestic

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[9] Tr. 18083-85.

[10] Tr. 18159.

[11] Tr. 18236-37.

[12] Tr. 18080-81.

[13] Tr. 18069.

[14] Tr. 18083.

[15] Tr. 18131-33.

monopoly. If the American mills could not meet this foreign price, they would have to abandon selling there.[16]

To show the bias of the witness, he identified the following criticisms of the Courts of the United States, and particularly of the United States Supreme Court, as they appear in his book "The Masquerade of Monopoly"—

> Under the caption "Shirking its Job" the phrase "The Supreme Court failed to pass either a scientific or a clear legal judgment * * *."[17]
>
> "The Court * * * side-stepped its responsibility."[18]
>
> "Judicial somersaults * * *."[19]
>
> "A bewildered judge."[20]
>
> The caption "The Courts Adrift."[21]
>
> "As credulous as the Supreme Court regarding the statements of promoters."[22]
>
> "Justice Stone's 'Reasons'."[23]
>
> "The Judicial Blindness of the Supreme Court."[24]
>
> "How the successful litigants must have roared with laughter over these naive economic views" (of the Supreme Court).[25]

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[16] Tr. 18133.

[17] Tr. 17811-12.

[18] Tr. 17812-14.

[19] Tr. 17815.

[20] Tr. 17815.

[21] Tr. 17816, 17833, 17835.

[22] Tr. 17840.

[23] Tr. 17842.

[24] Tr. 17842.

[25] Tr. 17844.

"The good Judge was all at sea, land nowhere in sight, without sextant or compass to fix his latitude or longitude."[26]

"A loose proposition from which is drawn" (by the Supreme Court) "a lame conclusion."[27]

"The dim sight and dull ears of the courts."[28]

"It is clear that the Court has improvised for the occasion a new statute of limitations to nullify the operation of the anti-trust act."[29]

"The plurality of the Supreme Court, however, in this instance preferred to loop-the-loop with Judge Buffington."[30]

"This is * * * the sense or nonsense of three Circuit Judges. In such elementary errors as this germinated the rule of reason."[31]

"Whenever a word has come to have various shades of meaning in the law, it is certain that some judge will some time go to the limit of verbalistic folly and propound a definition that is mere sound, without sense. Circuit Judge H. E. Jackson made a bid for the prize."[32]

"Many have remarked upon the Janus-faced attitude of the Court."[33]

"The weasel phrase 'in and of itself' served to shift the Judge's thought."[34]

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[26] Tr. 17846.

[27] Tr. 17848.

[28] Tr. 17851.

[29] Tr. 17853, 17855.

[30] Tr. 17856.

[31] Tr. 17858.

[32] Tr. 17866.

[33] Tr. 17867.

[34] Tr. 17871.

"Chief Justice White, with his dangerous gift of casuistry * * *."[35]

"The Supreme Courts' hesitating answers * * *."[36]

5. Dr. Edward G. Nourse

Dr. Edward G. Nourse, Economist and Director of the Institute of Economics of the Brookings Institution, Washington, D. C., was called in rebuttal as a witness for the Commission.[1]

Dr. Nourse testified on direct as follows:

The price of a standardized article in a competitive market eventuates out of the higgling in the market, at any single time, in approximating a uniform price; this is the consensus of economic theory.[2] This applies to prices actually paid and not to the quotations out of which the prices flow.[3] "It does not contemplate the sophisticated schemes of price quotations which have been developed in many parts of the industrial system."[4] There is nothing in economic theory that extends this theory to cover price quotations.[5] "The general theory of uniform price and market would mean that he would * * * not take from part of his market a lower price than he was taking from part of the other."[6]

On cross-examination he testified that the marketing of agricultural products is quite a different problem from the marketing of manufactured goods. The former are

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[35] Tr. 17877.

[36] Tr. 17880.

[1] Tr. 48133.

[2] Tr. 48139-40.

[3] Tr. 48142-45.

[4] Tr. 48145.

[5] Tr. 48146.

[6] Tr. 48148.

marketed on central exchanges, which is quite different from what you would expect to find in the case of homogeneous manufactured goods.[7]

If a seller in one market had found from previous experience that a lowering of price there would not increase his sales proportionately, it would be perfectly natural for him to endeavor to sell in other markets.[8]

B. Respondents' Economic Witnesses.

Counsel for the respondents called as witnesses five economists,—Prof. Clare E. Griffin, Dean of the Graduate School of Business Administration, University of Michigan; Prof. Roland S. Vaile, Professor of Marketing, University of Minnesota; Prof. Fred R. Fairchild, Department of Economics, Yale University; Prof. Ray B. Westerfield, Department of Economics, Yale University; and Prof. Ewald T. Grether, Department of Economics, University of California. A sixth economist was tendered as an expert,—Prof. Ralph B. Cassady, Department of Economics, University of California,—but his testimony and that of a further group of economists was excluded as being merely cumulative.[1] Each witness was accepted as a duly qualified expert witness, after a full statement of his education, experience and other qualifications.

Inasmuch as the testimony of these economists covered a group of subjects upon which each testified, it is here summarized according to the subject matter.

1. Economic Concepts of Competition

"Competition is the rivalry of sellers for the patronage of a given group of buyers."[1] It is "the effort by two or

[7] Tr. 48162-63.

[8] Tr. 48168-69.

[1] Tr. 46264.

[1] Griffin (R) Tr. 43355.

more sellers to sell to the same buyer or buyers, each seller acting in his own individual interest without regard to the interest of other competitors."[2]

"Free competition is competition in which there is no collusion or outside pressure from the Government, so that each buyer and seller can act independently for his own self-interest."[3]

Competition in its various forms and aspects "has received considerable attention in recent years. * * * Particularly in the last two decades, there has been quite a bit of emphasis placed upon the concepts of perfect and imperfect competition."[4]

"Perfect competition is the rivalry of sellers, a very large number of sellers, so large that the offering or withholding by any one of them of his portion of the supply does not affect the market, except infinitesimally, possibly. It requries a homogeneous commodity, * * * informed buyers * * * (and) free movement of capital and labor,—the factors of production,—into and out of the industry."[5] "Perfect competition" may be compared "to absolute zero, a concept which the physicist uses."[6] "We have found no way by which we can get perfect competition in this world, any more than the physicists have yet been able to get to absolute zero."[7] It is impossible to have "perfect

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[2] Fairchild (R) Tr. 44628. To the same effect, Griffin (R) Tr. 42957; Grether (R) Tr. 45826.

[3] Westerfield (R) Tr. 45528. To the same effect, Griffin (R) Tr. 42984; Vaile (R) Tr. 44098; Fairchild (R) Tr. 44637; Grether (R) Tr. 45806-07.

[4] Griffin (R) Tr. 42946-47.

[5] Westerfield (R) Tr. 45491. Similarly defined by Griffin (R) Tr. 42449; Vaile (R) Tr. 44144-45; Fairchild (R) Tr. 44628; Grether (R) Tr. 45807-08.

[6] Vaile (R) Tr. 44144.

[7] Id., Tr. 44411.

competition" in any manufacturing industry.[8] It is a purely theoretical concept that does not exist in any industry.[9] (This was corroborated by Commission's witness, Dr. Viner.[10]) It is most closely approximated in the marketing of certain agricultural products, such as grain, on large central exchanges.[11]

"Imperfect competition" is "any departure from this set of conditions * * * characteristic of perfect competition; specifically, would be a small number of buyers and sellers * * * or anything less than perfect knowledge of the market. * * * In fact any of the departures from the assumptions of perfect competition would give you * * * imperfect competition."[12]

The term "imperfect competition" does not imply any element of illegality or of collusion or agreement.[13] Large scale factory production always results in fewness of sellers and therefore in "imperfect competition."[14] It would be impossible even to approximate the conditions of "perfect competition" in the cement industry.[15]

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[8] Vaile (R) Tr. 44147.

[9] Westerfield (R) Tr. 45491, 45492; Griffin (R) Tr. 42953-54, 42956; Fairchild (R) Tr. 44636, 44954; Vaile (R) Tr. 44143; Grether (R) Tr. 45827.

[10] Commission's witness, Dr. Viner, testified: "I would say it (complete and perfect competition) doesn't exist probably anywhere, now, for any important industry." Tr. 15791.

[11] Griffin (R) Tr. 42955, 43299-300; Westerfield (R) Tr. 45684.

[12] Griffin (R) Tr. 42950-51. To the same effect, Vaile (R) Tr. 44146-47; Fairchild (R) Tr. 44631; Westerfield (R) Tr. 45491; Grether (R) Tr. 45826.

[13] Westerfield (R) Tr. 45494; Fairchild (R) Tr. 44633, 44948; Griffin (R) Tr. 42953; Grether (R) Tr. 45826-27.

[14] Westerfield (R) Tr. 45493, 45773-74; Fairchild (R) Tr. 44954-55, 44936-38; Griffin (R) Tr. 42955-56; Vaile (R) Tr. 44147.

[15] Griffin (R) Tr. 42956; Fairchild (R) Tr. 44635; Vaile (R) Tr. 44324-25.

"Imperfect competition" does not mean absence of competition. "Imperfect competition is apt to be more vigorous and aggressive as a rule than perfect competition for the obvious reason that it is only in imperfect competition that the acts of one competitor will have a substantial effect upon price. It is only in imperfect competition that the competitor has to be pretty careful about the reactions of his competitors to his own actions."[16] (This was corroborated by Commission's witness Dr. Hibbard,[17]) Under imperfect competition "each mill must take into account the effect of its actions on the market and the effect of the actions of other people upon the market."[18]

"Imperfect competition" does not imply the presence of monopoly or a progress toward monopoly.[19]

2. Effects of Imperfect Competition.

Among the effects of imperfect competition, when due to fewness of sellers, is individual self-restraint in price policies.

"When numbers are relatively small in a trade or industry, * * * small enough so that the policies of any one firm have an appreciable impact or effect upon the policies of other members * * *, it is of the essence of competition that there will be some restraint exercised, because if * * * a firm does not * * *, it will arouse retaliation from com-

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[16] Fairchild (R) Tr. 44633-34. To the same effect, Griffin (R) Tr. 42954-55; Fairchild (R) Tr. 44939; Westerfield (R) Tr. 45492-93; Vaile (R) Tr. 44144-47.

[17] Commission's witness Dr. Hibbard said: "The business man of ordinary judgment prefers to let well enough alone, and so goes ahead depending on the margin of profits which he can make over the non-profit competition, rather than flying to the ills of aggressive competition, the outcome of which is precarious." (Tr. 20483-84)

[18] Griffin (R) Tr. 43465.

[19] Fairchild (R) Tr. 44921-22.

petitors. For instance, in so far as prices are concerned, it will develop a situation where a price war will be produced * * *."[1] Each one "realizes that what he does may affect that market in which he is going to have to live."[2] "Every business man * * * expects a degree of self-restraint on the part of others, and he exercises it himself."[3] (This was corroborated by Commission's witness Dr. Viner.[4])

Under conditions of "imperfect competition", high overhead costs, when combined with fewness of sellers and excess capacity, are a further cause of individual self-restraint; "if * * * there is not a natural restraint * * * in determining their price policy, it is likely to lead into ruinous competition."[5]

Such exercise of self-restraint in pricing policies does not justify an inference of collusion,[6] and does not nega-

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[1] Grether (R) Tr. 45827-28.

[2] Griffin (R) Tr. 43003.

[3] Westerfield (R) Tr. 45535. To the same effect, Vaile (R) Tr. 44216, 44409, 44412; Fairchild (R) Tr. 44635.

[4] When Commission's witness Dr. Viner was asked "would you expect a rational business man, pursuing his own interests, and having in the past, experienced this kind of price reduction leading to price wars, to embark upon price reductions likely to have such a result?" and he replied, "No, sir; I would not." (Tr. 15757-58) Commission witness Dr. Fetter testified, "I do not impugn their motives nor do I doubt their sincerity. There are reasons for their attitude, and you and I and others would look at it as they did. * * * And there is some justification for their attitude. The present method of basing-point practice and identical delivered prices were adopted as a means of escape from a chaos of discrimination, to which they looked back with a certain terror. There is a tradition of the reign of terror and this cutthroat competition which preceded the basing-point practice." (Tr. 18156-57)

[5] Griffin (R) Tr. 43067-68, 43664.

[6] Griffin (R) Tr. 43004; Westerfield (R) Tr. 45535; Grether (R) Tr. 45828.

tive the existence of free competition. "I should not say that that meant * * * there was not free competition as long as he took that action on his own initiative."[7]

Another effect of "imperfect competition" is market leadership; "in fact it is implied in the concept of imperfect competition that sellers * * * are aware of the policies of other sellers and are adapting their policies to the policies of these other sellers."[8]

Market leadership does not create an inference of collusion.[9] (Commission's witness Dr. Viner in substance corroborated this.[10])

3. The Definition of "Price Competition"

"All competition in the sale of goods in which the buyer must give attention to price, is price competition."[1] "It is impossible to separate competition in price from other elements of competition, such as quantity, quality, services, et cetera."[2] "Any activities which represent an offer on the part of the seller to present a more attractive bundle of goods and services to the buyer falls under this head of price competition."[3]

"A condition of price competition would exist in the case of the gasoline stations I mentioned" (i.e. quoting

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[7] Fairchild (R) Tr. 44638. To same effect, Vaile (R) Tr. 44218.

[8] Griffin (R) Tr. 43091.

[9] Westerfield (R) Tr. 45563, 45713; Griffin (R) Tr. 43091.

[10] Commission's witness Dr. Viner testified only that market leadership does imply collusion "if it is a continued, systematic following, if it is regularly done, continued; then I think it involves understanding". (Tr. 15776-77)

[1] Fairchild (R) Tr. 45235.

[2] Westerfield (R) Tr. 45494.

[3] Griffin (R) Tr. 42964. To the same effect, Westerfield (R) Tr. 45651; Vaile (R) Tr. 44386; Fairchild (R) Tr. 44731, 45210.

identical prices) * * * "characterized by general alertness and watchfulness and readiness to adjust one's price or offerings to the price or offerings of competitors; an act of price competition might be regarded as the use of the weapon, the price, something like the distinction * * * between an act of war and a state of war."[4] "Holding a price steady under the stress of forces which might be pushing everybody to raise it may be just as vigorous and drastic a thing as lowering a price under entirely different circumstances."[5]

4. Identical Market Prices

The economic principle that "a homogeneous product can have but one price in any one market at any one time" was testified to by each of these economists.

"It is established and well-accepted that the price of a homogeneous product in a market at any one time would be a uniform price."[1] "There cannot be two prices at the same time and the same place for the same commodity under conditions of competition."[2] "On that point * * * there is no difference between classical theory and modern theory."[3] "The uniformity (in price) that results from competition must arise from the fact that no buyer will pay more for a homogeneous product to one seller than he will to another at a moment of time and place."[4] (This

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[4] Griffin (R) Tr. 42966-67. To the same effect, Griffin (R) Tr. 43393-94; Fairchild (R) Tr. 44740; Grether (R) Tr. 46128.

[5] Fairchild (R) Tr. 44763.

[1] Griffin (R) Tr. 42023.

[2] Fairchild (R) Tr. 44658.

[3] Griffin (R) Tr. 43692-93.

[4] Vaile (R) Tr. 44177-78, 44460; See also Westerfield (R) Tr. 45505; Grether (R) Tr. 45854.

was corroborated by Commission's witnesses Dr. Viner and Dr. Nourse.[5])

This economic principle of identical price has no relation to the marketing method employed. It applies "in a market, under the assumptions of a well-informed group of buyers, and several sellers offering a substantially identical product."[6] "Given that set of assumptions, you would have identical delivered prices regardless of the method of marketing."[7] "You would get identical delivered prices under any other kind of (marketing) system, therefore I would not say that it was a result of it."[8]

This economic rule of identical price requires that the goods of the different sellers be "homogeneous." A product is considered "homogeneous" if the buyer regards its different units as satisfying equally the buyer's needs and desires, so that he has no reason for paying more for one unit as compared with another.[9] (Commission's witness Dr. Viner testified to the same effect.[10]) "The essential

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[5] Commission's witness Dr. Viner also testified, "We know that where the buyer is free to choose as between the sellers at the same point, there cannot persist substantial differences in price delivered by the different producers actually selling at that point." (Tr. 15674), and again, "I could not explain continuance of two different prices in the same market if there was real competition." (Tr. 15762) See testimony of Commission's witness Dr. Nourse to same effect. (Tr. 48138-40).

[6] Griffin (R) Tr. 43528.

[7] Id., Tr. 43584.

[8] Id., Tr. 43525. To same effect, Fairchild (R) Tr. 45048-49; Vaile (R) Tr. 44173; Westerfield (R) Tr. 45506; Grether (R) Tr. 45854.

[9] Griffin (R) Tr. 43588-89.

[10] Commission's witness Dr. Viner in effect subscribed to this concept when he testified that there is no cross-hauling "if * * * they are differentiated to the buyers." (Tr. 15798-99)

quality of a commodity being homogeneous is that so far as the buyers are concerned, they have no reason to choose one unit as compared with another."[11] "The fact that some differences in quality have not been disclosed to them would not affect my answer."[12]

The economic rule of identical price relates to "terms and discounts" which are an integral part of "price", and uniformity in such terms and discounts is therefore to be expected.[13] "There is a definite pressure toward uniformity."[14] "There is probably abundant evidence in the American marketing system of that situation."[15] If any producer failed to offer terms and discounts regarded by his customers as equally desirable as those of other producers, he would lose patronage.[16] Therefore the fact that such terms and discounts are customarily identical from all producers does not indicate collusion but is a normal result of competitive activity.[17] "Other things being equal, the higher the degree of competition, the higher the degree of uniformity (in such practices) I would expect to find."[18] "The more rigorous active competition is, the more likely would be the arrival at uniformity in matters of price and trade practices and so forth."[19]

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[11] Fairchild (R) Tr. 45135.

[12] Id., Tr. 45141.

[13] Id., Tr. 44707-08.

[14] Vaile (R) Tr 44184-87.

[15] Grether (R) Tr. 45879. To the same effect, Griffin (R Tr. 43094, 43469.

[16] Vaile (R) Tr. 44184-87; Westerfield (R) Tr. 45580-81; Grether (R) Tr. 45876-79; Griffin (R) Tr. 43092, 43762.

[17] Vaile (R) Tr. 44187; Westerfield (R) Tr. 45581-82; Grether (R) Tr. 45879.

[18] Griffin (R) Tr. 43094.

[19] Fairchild (R) Tr. 44708-09.

In stating this economic rule of identical price, the economist frequently states it as "a tendency toward uniform price."[20] (The Commission's witnesses testified similarly.[21]) The word "tendency" has a special meaning to the economist,—"All scientific laws are tendencies. A tendency means that a certain set of causes will inevitably produce a certain result, if not operated on by other causes not specified."[22] "A tendency means that certain causes in the absence of other forces will produce certain results."[23] "All other things being equal, * * * this thing will happen."[24]

While the economist refers to this economic rule as producing "approximate identity of price", they explain the qualifying word "approximate" as follows,—"For such times when a change in price is being made, there would be an instant of time in which they would be out of line."[25] "The presence of some off-price sales here and there would not destroy the general principle. That is, there might be some buyers not fully informed who would purchase at a higher price than they need to pay."[26] Except for such exceptions identical prices "would have to follow in the very nature of economic activities."[27] "That is what the economist expects to find."[28] "All other things

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[20] Griffin (R) Tr. 43023, 43965; Vaile (R) Tr. 44508-09; Fairchild (R) Tr. 44659, 45416-17; Westerfield (R) Tr. 45506.

[21] Similarly used by Commission witnesses Hibbard (Tr. 15588), Fetter (Tr. 17710) and Nourse (Tr. 48140).

[22] Fairchild (R) Tr. 44659.

[23] Id., Tr. 45143.

[24] Vaile (R) Tr. 44509.

[25] Griffin (R) Tr. 43023.

[26] Fairchild (R) Tr. 44658.

[27] Griffin (R) Tr. 43537.

[28] Vaile (R) Tr. 44177.

being equal, and given complete information, this thing will happen."[29] "You can say that under those conditions, this would result inevitably, so far as any practical event is inevitable."[30] (The Commission's economists testified to the same effect.[31])

These witnesses testified that at any one time and in any one market, they would expect identical quotations as well as prices. "If the buyers are informed, knowing how the price is made up and if the sellers are informed * * *, there can be only one bid and asked price, because they won't bid and ask anything less than that. It would be just foolishness for them to bid lower than that. It is general economic theory * * *."[32]

5. Quoting Identical Price is Competitive

"The meeting of a competitor's price is a normal competitive act, and a resolution to do that is a normal competitive attitude."[1] "Meeting competition is, as I see it, just a method of stating that there is competition."[2]

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[29] Vaile (R) Tr. 44509.

[30] Fairchild (R) Tr. 44659. To same effect, Fairchild (R) Tr. 45172; Westerfield (R) Tr. 45681; Grether (R) Tr. 43090.

[31] Commission witnesses testified similarly,—Dr. Hibbard testified "It would result in substantial uniformity" (Tr. 15588); Dr. Viner,—"The uniformity of delivered price under competition * * * would be approximate or close" (Tr. 15688), and again "For a standardized commodity * * * I would expect to find a substantial degree of uniformity of price * * * that buyers located at the same point are paying at the same time." (Tr. 15813), and Dr. Nourse, "For a single market at a single time this approximates uniform price." (Tr. 48140) Dr. Viner also testified "I could not explain continuance of two different prices in the same market if there was real competition." (Tr. 15762)

[32] Westerfield (R) Tr. 45680-81. To the same effect, Griffin (R) Tr. 43024.

[1] Griffin (R) Tr. 43209-10.

[2] Westerfield (R) Tr. 45601.

"You cannot get the business unless you are at the same level as your competitors."[3] "It is important in this industry, under the assumptions, that you have identical prices at a given point in order to be competitive."[4] "I would not say that price competition had ceased merely because the price becomes identical. * * * Identical price is a phenomenon closely associated with competition, and certainly is not evidence of lack of competition."[5]

6. Identical Delivered Prices

These economists called by the respondents were unanimous in their opinion that the economic rule of identical price applies to delivered prices.

"Everywhere else" (than at the mill) "the thing that is uniform in accordance with this economic principle is the delivered price after covering whatever freight or transportation costs are necessary to get it to the point of delivery."[1]

"No one buyer will pay more for a commodity than he has to pay, and he will make strenuous effort not to pay any more than other buyers pay at the same moment and place. Now that force can operate only at the point where the buyers want to use their commodity. * * * No user will pay more to one seller at his point of use than he will pay to another seller at that point of use."[2]

Such identical delivered prices do not justify an inference of collusion.[3] "It needs no such collusion, because uni-

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[3] Grether (R) Tr. 45999-6000.

[4] Id., Tr. 45999. To same effect, Griffin (R) Tr. 42967; Grether (R) Tr. 45906-07.

[5] Vaile (R) Tr. 44167. To same effect, Griffin (R) Tr. 43394.

[1] Fairchild (R) Tr. 44766.

[2] Vaile (R) Tr. 44331-32. To same effect, Griffin (R) Tr. 43023-24; Westerfield (R) Tr. 45505-06; Grether (R) Tr. 45851-52.

[3] Griffin (R) Tr. 43025, 43345; Vaile (R) Tr. 44172, 44528-29; Fairchild (R) Tr. 44657-58; Grether (R) Tr. 45852-54; Westerfield (R) Tr. 45508-09.

formity of price I would think would be a necessary condition in a competitive market where buyers are well-informed and where the buyers have the option of purchasing from different sellers.'"[4]

(Dr. Viner, a witness for the Commission, testified similarly.[5] Dr. Fetter, also a Commission witness conceded that uniform price may be the result of competition.)[6]

The economist expects this identity of delivered prices to result, irrespective of the method of marketing employed. Whether you had a basing point method or an f.o.b. mill method of selling, "from the point of view of having identical prices, there would be no difference between those two plans. Any plan would have to give you that."[7]

7. Significance of High Overhead Costs

Overhead costs are "costs which do not vary directly with * * * volume of output * * *"[8] such as "interest on borrowed money, depreciation, maintenance, and salaries of the executive staff."[9]

As to the relation between high overhead costs and selling in more distant territory by so-called freight-absorption,—"There is a very definite connection there, in my opinion." * * * "Since overhead costs are high relative to

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[4] Fairchild (R) Tr. 44658.

[5] Dr. Viner testified, "we know that where the buyer is free to choose as between the sellers at the same point there cannot persist substantial differences in price delivered by the different producers selling at that point." ((C) Tr. 15674)

[6] Dr. Fetter testified, "It is a general economic opinion that mere uniformity (of price)—that thing alone might be consistent either with a real competitive or a monopolistic situation." (Tr. 18156) Also he testified that if a seller finds other sellers quoting lesser prices in the market, "he has to meet the price, to keep from being cut out of a sale." ((C) Tr. 17959)

[7] Griffin (R) Tr. 43508-09. See also Fairchild (R) Tr. 44795-96.

[8] Griffin (R) Tr. 43065-66. To same effect, Vaile (R) Tr. 44230-32; Fairchild (R) Tr. 44752-54; Grether (R) Tr. 45901.

total cost or sales value, the additional costs of producing an additional quantity of product are relatively small for unit of product, and consequently a mill net price which permits the mill to * * * intrude competitively into another territory is likely to cover those direct costs and stay relatively low, and leave something to apply towards the lump sum of overhead cost, and that would be in the interest of the company. * * * You have unused capacity left as a result of the demand situation in your local community. If you can sell in some other community at a price which is competitively determined at that point of use, and which nets to you something more than your direct costs, * * * give you something more to apply to your total of overhead costs, it is a rational action apparently in the interests of the individual making the decision to conduct that type of business and offer cement at freight-absorbing prices.'"[2]

"He wants to have a large output to reduce his cost. Therefore, he must sell over a broader area. It is a struggle to enlarge his market."[3]

"It is a natural desire on the part of the business man to obtain such volume as will enable him to get low unit costs; * * * high overhead costs have the effect of leading the producer to strive for volume * * * in order to keep unit costs down. It has the effect also of leading him to charge different prices on the different parts of his output, * * * mill net I am referring to."[4] (Dr. Fetter, Commission witness, conceded the incentive to increase output in order to reduce unit costs.)[5]

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[2] Vaile (R) Tr. 44234-35. To same effect, Fairchild (R) Tr. 44754-55.

[3] Westerfield (R) Tr. 45561.

[4] Griffin (R) Tr. 43070-71.

[5] Dr. Fetter conceded that it is the usual accountancy method to distribute overhead costs uniformly over the units produced, and that on the basis of this accounting practice it is a well-recognized economic principle that unit costs decrease as total output increases toward full capacity. ((C) Tr 18040-41)

"Overhead costs have this significance, that if * * * there is not a natural restraint on the part of individual business men in determining their price policy, it is likely to lead to ruinous competition. * * * It is quite possible to get into a form of competition which bases price on out-of-pocket costs, which would be ruinous."[6]

8. Effect of Inelastic Demand.

"Elasticity of demand refers to that quality of demand by which the demand increases as the price decreases, and decreases as the price increases; in other words, an inverse relationship between price and demand. * * * When the demand for a product shows this quality in a high degree, we call that elastic."[1]

"If the demand were perfectly elastic, all the supply that any producer would want to produce could be sold in his local market. All he would have to do would be to lower his price just a little bit and he would get rid of his supply right there, and obviously under those circumstances he would not absorb freight to get into competition with other people's supply, and so on. So that condition (*i.e.* inelastic demand) 'is essential to natural development of basing point systems'."[2]

"If the demand for the product were highly elastic, that would be one reason that would encourage a manufacturer to get the increased volume * * * from his immediate market by lowering price. When, however, the demand is relatively inelastic, that is not open to him, and so he turns to the alternative of selling in the more distant market".[3]

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[6] Griffin (R) Tr. 43067-68.

[1] Griffin (R) Tr. 43056-57. To same effect, Vaile (R) Tr. 44449-50; Fairchild (R) Tr. 44693-97; Westerfield (R) Tr. 45584.

[2] Vaile (R) Tr. 44119.

[3] Griffin (R) Tr. 42991-92.

9. Freight-absorbing Sales are Competitive

These economists were unanimous in their opinion that so-called "freight-absorbing" sales are a form of competition.

"Cross-hauling implies that one seller is reaching over and selling in another seller's nearby market and that he is meeting the price in that nearby market in order to do so, which is clearly, in my opinion, a form of competition * * *. Under an assumption of imperfect competition, cross-hauling is quite common and is a characteristic of that type of competition."[1]

One effect of freight-absorbing sales is "in creating several sellers in one market, at least creating more than one seller at the same market and thus providing competition, rivalry between the different sellers, for the patronage of the buyers at that point".[2]

"Even though he gets no monetary price concession * * * he, (the buyer) may get certain other benefits from one seller that he cannot get from the other; prompter delivery might be one, for example."[3]

This was corroborated by Dr. Viner, a witness for the Commission.[4]

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[1] Griffin (R) Tr. 43089.

[2] Id., Tr. 43014. To the same effect, Fairchild (R) Tr. 44757-58.

[3] Vaile (R) Tr. 44120-21.

[4] Dr. Viner said ((C) Tr. 15721-22, 15821), referring to dumping, which is the term he used in referring to freight-absorbing sales,—"Q. Then I suppose you would agree that dumping is therefore a form of competition? A. Yes. That's a form of competition, * * * it is a competitive act."

10. Freight-absorbing Sales Do Not Indicate Collusion

"I do not think that cross-hauling would naturally grow out of collusion."[1]

"The very fact of freight absorption indicates to me that there must be competition there."[2] "It is very difficult to understand why people who are colluding would collude to put their goods into one another's territory * * *. It seems to me an evidence of competition rather than of collusion."[3]

(Dr. Viner, a Commission witness, testified to the same effect.)[4]

11. Causes of Basing-Point Pricing

These economists regard the development of a basing-point method of pricing in an industry as a natural one, whenever the industry has certain characteristics.

"I would classify these characteristics or features that would be favorable to the existence of the basing-point method under three heads,—certain characteristics of the product, certain characteristics of the producers of the product, and characteristics of demand. As to character-

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[1] Griffin (R) Tr. 43642; see also Tr. 43645. To same effect, Vaile (R) Tr. 44527; Fairchild (R) Tr. 44840.

[2] Westerfield (R) Tr. 45664.

[3] Id., Tr. 45728-29. To same effect, Grether (R) Tr. 46066.

[4] Dr. Viner, a witness for the Commission conceded this fact when he testified,—

> "The continued existence of differentials in f.o.b. mill prices to produce s according to the location of the purchasers would be consistent with the absence of any agreement or understanding between producers only if the producers were all scattered geographically so that each producer was protected in his own immediate vicinity by the cost of transportation thereon from the nearest other producer." (Tr. 15814-15)

istics of the product, I think that a standardized product and a heavy product, reasonably or moderately heavy and bulky product; under the characteristics of the producers, where there are a limited number of them, when they are scattered geographically, when they are independently owned, and when they have high overhead costs. I should think as to the characteristics of the demand, inelasticity of demand. Now, given that combination of factors, I think that combination of factors would be favorable to the existence of a basing-point method."[1]

Dr. Grether testified that in the classroom "I teach that the use of the basing-point method is a spontaneous expression of conditions in the industry."[2]

As to these various factors that create basing-point selling, the testimony was as follows,—

a. Homogeneous Commodity

"If you did not have a standardized product but did have a number of the other characteristics, then I would expect to find freight absorption, but freight absorption of a sporadic sort. * * * When you have the product almost identical in quality, then that is more favorable to the setting up of a more regularized sort of freight absorption."[1]

Similar testimony was given by each of the experts called by respondents.[2]

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[1] Griffin (R) Tr. 42985-88. To the same effect, Grether (R) Tr. 45809; Vaile (R) Tr. 44116; Fairchild (R) Tr. 44741; Westerfield (R) Tr. 45538.

[2] Grether (R) Tr. 46011; see also Tr. 45921.

[1] Griffin (R) Tr. 42987-88.

[2] Vaile (R) Tr. 44116-18; Fairchild (R) Tr. 44741-42; Westerfield (R) Tr. 45538-39; Grether (R) Tr. 45809. See also Griffin (R) Tr. 43483-84.

b. Substantial Freight Cost

"Another condition is that the product is a heavy product, so that freight is an important part of the delivered cost, but at the same time not so heavy in proportion to its value that it could not have more than a strictly local market.'"[1]

"If it were not a heavy product but very light, then I would expect the postage stamp principle of prices. • • • If your product were extremely heavy, • • • it would be just almost out of the question to move the product from one market area away over into another; then I would not expect to find the basing-point method, either; and so what I have in mind is that degree of bulkiness and difficulty of transportation lying between these two extremes would seem to me to be favorable to the existence of a method of this kind.'"[2]

c. High Overhead Costs

"If you did not have overhead costs • • • sellers would be less willing to accept a lower price for some units of the product than for others; but under a condition of overhead costs, you have a distinction between average cost, overall-costs, and out-of-pocket costs, and it therefore becomes not only possible but very natural that a seller • • • sell some of his goods on • • • the basis of out-of-pocket costs. • • • A high overhead cost creates the pressure for volume, or certainly increases the pressure for volume".[1]

d. Inelastic Demand

"Another matter which is clearly imperative • • • for the natural development of this (basing-point) system is

[1] Fairchild (R) Tr. 44744.

[2] Griffin (R) Tr. 42988-89.

[1] Id., Tr. 42986-87. To the same effect, Vaile (R) Tr. 44116-18; Westerfield (R) Tr. 45538-39; Fairchild (R) Tr. 44741-42; Grether (R) Tr. 45809-10.

inelasticity of demand. If the demand were perfectly elastic, all the supply that any producer would want to produce could be sold in his local market.'"[1]

"If the demand for the product were highly elastic, that would be one reason that would encourage a manufacturer to get the increased volume which he desired under this overhead cost * * * from his immediate market by lowering price. When, however, the demand is relatively inelastic, that is not open to him, and so he turns to the alternative of selling in the more distant market".[2]

e. Other Essential Conditions

Other conditions contributing to produce basing-point as a natural development were suggested by these economists,—

1. Relatively few producers, and these scattered geographically—and independently owned.[1]

2. Capacity of most mills in excess of local demand.[2]

3. Producers variously located with respect to market, —i.e. the buyers present a demand pattern different from the pattern of mill location.[3]

Referring to all of the stated conditions, it was testified,—

"No one of these items * * * taken alone, will produce the basing-point system as a natural form of quoting of

[1] Vaile (R) Tr. 44119.

[2] Griffin (R) Tr. 42991-92. To same effect, Grether (R) Tr. 45810; Fairchild (R) Tr. 44742.

[1] Griffin (R) Tr. 42986, 42990-91; Fairchild (R) Tr. 44742; Vaile (R) Tr. 44118.

[2] Fairchild (R) Tr. 44742. This is another way of stating inelastic demand, referred to, *supra*.

[3] Griffin (R) Tr. 42990; Fairchild (R) Tr. 44742; Vaile (R) Tr. 44118; Westerfield (R) Tr. 45539; Grether (R) Tr. 45809-10.

prices * * * but where the group comes in conjuncture, then it seems to me highly likely that this form of quoting prices will naturally develop".[4]

12. Marketing Method Used in Cement

The method of pricing and selling cement by the use of the basing-point method was stated to each of respondents' expert witnesses as follows:—

> "Let us assume that the following description is a statement of the conditions of the cement industry as of July 1, 1937:
>
> * * *
>
> Cement is a homogeneous commodity. There are approximately 150 cement mills, scattered throughout the United States, owned by more than 50 separate independent companies. Cement mills usually have large capacities with large capital investments. The capacity of most mills exceeds the local demand. Freight is a substantial part of the cost of cement delivered to the point of use or resale. The volume of the demand for cement varies in each locality from year to year and month to month. Sometimes there is a large demand in a given market and at other times there is a small demand in that market. The manufacturers of cement which market their product in any given territory are engaged in a struggle for tonnage.
>
> There are a very large number of buyers, and they are scattered throughout the country. At any point of substantial cement consumption there are several buyers. Buyers of cement (including dealers, contractors and other purchasers) are well informed with respect to the prices charged and the methods of sale employed by competing manufacturers. Buyers purchase on the basis of the lowest cost at the point of use or resale. For more than 20 years buyers have refused to pay any more for one brand of domestic cement than another. For more than 20 years cement has usually been quoted and

[4] Vaile (R) Tr. 44119-20.

sold at destination prices. Buyers of cement normally request prices f.o.b. destination. From time to time some manufacturers have, upon request, made sales to customers f.o.b. mill.

In quoting prices a manufacturer usually takes into consideration the prices which have been quoted by his competitors for delivery at the destinations in question. At any destination the openly quoted delivered price appears to reflect some pattern. The most prevalent of these patterns is the lowest combination of some price base plus actual freight from the basing point. Another pattern appears to exist when the same price is quoted at a number of adjacent destinations (such prices having sometimes been called in this case flat or zone prices). A third pattern appears to exist when prices radiate from some market area (such prices having been sometimes called in this case arbitrary prices and have been made around some ports to meet the competition of foreign cement, and at other places to meet other competitive conditions). Flat, zone and arbitrary prices do not reflect the variations in actual freight charges.

Fifty or more mills are basing-point mills and about 60 percent of the productive capacity of all mills is located either at or within a few miles of basing-point mills. These basing-point mills are scattered throughout the country. Each manufacturer can at any time make its mill or plant a basing-point mill. At different times the same mill has been a base mill and a non-base mill. The total number of base mills has varied from time to time. All manufacturers, including those with basing-point mills, shrink their mill nets in making sales at distant points.

Whenever a lower price is openly quoted by one manufacturer, other manufacturers selling at that destination have found it necessary either to reduce their delivered price to meet this lower price or to withdraw from actively soliciting business at that point. It has been the experience of each manufacturer that an open reduction in prices is met immediately by competitors, and that a quoted reduction in prices does not bring a compensating in-

crease in the cement consumed where the decrease is effective nor a compensating increase in the sales of the manufacturer initiating the decline. Each manufacturer has invested considerable time and money in developing channels of distribution, such as dealers and contractors. A mere reduction in price does not ordinarily drive a manufacturer out of a consuming area where it has developed customer good will. It has been the experience of each manufacturer that an open reduction in price has, from time to time, provoked further reductions in price by competitors. Such open price reductions have sometimes resulted in price wars.

For more than 20 years most manufacturers have regularly broadcast their prices to the dealer trade. In quoting decreases in price a manufacturer usually makes it effective at once and buyers are usually reimbursed for shipments made just prior to decline. In quoting increases in price a manufacturer usually makes it effective in several days after the announcement is received by the trade. In the event of an increase no sales are made at the higher prices unless all competing companies announce that they are following the increases, and no such sales are made until the quotations of all the companies competing in a given market have become effective. Any manufacturer, no matter how small, can initiate an effective decrease in price.

For more than 20 years dealers and contractors have been protected on specific job contracts in the event of an increase in price, and have been given the benefit of the new low price in the event of any decline in price. Upon an increase in price dealers and contractors are protected on spot shipments by having an opportunity to buy any quantity of cement for which they will take shipment within 15 days after the increase has become effective in that market. Various manufacturers have found that they do not sell a substantial quantity of cement at their increased price even if their competitors followed the increases until several months after the increase became effective.

Some manufacturers have quite consistently adhered to their publicly quoted prices and other

manufacturers have made sales at reductions from their publicly quoted prices, such sales being intended to be secret prices. Other manufacturers have made sales reflecting special terms or concessions not contained in their open price announcements. The announcements to the trade of these manufacturers which made secret prices or concessions quote a price not below the lowest openly quoted price of any competitors. These secret price cuts often become known to competitors. There have usually been some secret prices, concessions or variations in terms being made by various cement companies. The volume and amount of such secret prices have tended to increase when the demand for cement was small.

Customers often give manufacturers an opportunity to meet the lowest price available to them whether it is publicly or secretly quoted. Manufacturers have observed that if a special price is quoted to one customer, other customers upon learning of this fact demand similar concessions. When competitors learn of such price concessions they frequently meet such lower prices either by granting similar concessions at the same or other destinations, or by openly announcing a general price reduction which affects a large consuming area. Manufacturers have been shown from past experience that extensive secret price concessions in many markets may result in open price war.

There have been price wars in the cement industry. In the event of price war prices have been reduced to a level approximating the out-of-pocket cost of production. Price wars continue until some manufacturer takes the initiative in raising prices and his lead is followed by his competitors. The quoted price at any given destination does from time to time remain stable for long intervals except to the extent of changes in freight rates. In some markets there have been periods of time up to three or four years where the lowest quoted price has not changed, except to the extent of changes in freight rates.

Diversions in transit are usually not permitted by manufacturers, and they try to discourage and

prevent diversions. Many manufacturers in widely scattered parts of the United States do not permit dealers to come to their mills and take delivery by truck. Some receive no requests from customers for truck delivery. Some manufacturers allow dealers to come to the mill and take delivery by truck. Such sales are frequently made at the same price as though the cement had been delivered to the dealer's warehouse." (Tr. 42967-73)

Throughout the subsequent testimony these assumptions were referred to as "Respondents' Long Hypothetical Question".

Several questions were asked each of these five economists based on these assumptions which purported to be an accurate description of the multiple basing-point method of pricing now employed in the industry.

Question 1. "In your opinion as an economist could the marketing practices as described logically be the result of an economic development in such an industry?"

Each of these economists testified that the marketing practices could be the result of an economic development.[1]

Question 2. "Do these marketing practices preclude the existence of free competition?"

Each economist answered in the negative without qualification.[2]

Question 3. "Do these marketing practices indicate that they were arrived at by collusion or conspiracy?"

Each economist testified that these practices did not indicate that they were the result of collusion or conspiracy.

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[1] Griffin (R) Tr. 42974-75; Vaile (R) Tr. 44098; Fairchild (R) Tr. 44618; Westerfield (R) Tr. 45509-16; Grether (R) Tr. 45806.

[2] Griffin (R) Tr. 42974-75; Vaile (R) Tr. 44098; Fairchild (R) Tr. 44618-19; Westerfield (R) Tr. 45516; Grether (R) Tr. 45806.

"I do not see how an economist could draw the inference of collusion or conspiracy from the practice as described."[3]

"There is no evidence in the assumption * * * that suggest to me as an economist that they were arrived at by collusion or conspiracy."[4]

The basing-point system "is not dependent upon cooperation. It can be as well dependent upon individual action under self-interest."[5]

"It is difficult for me to believe that a method of this kind covering as large an area as the United States * * * could be arrived at or maintained chiefly by * * * collusion or agreement. I would draw the inference from the existence of such a method that there must be more natural economic forces underlying it."[6]

"The actions which are occurring in this industry are, it seems to me as a student of such things, the actions that are to be expected when the individuals * * * operating as individuals, are free to act in what they believe to be their own best interests in an industry with the general characteristics that this industry possesses."[7]

"You would have had this method of marketing any way, in my judgment, and therefore * * * you cannot logically say that it grows out of collusion, if collusion is not necessary to explain it."[8] "It would certainly stretch my imagination a great deal to accept any such conclusion."[9]

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[3] Griffin (R) Tr. 42975.

[4] Vaile (R) Tr. 44099.

[5] Westerfield (R) Tr. 45597.

[6] Griffin (R) Tr. 43247.

[7] Vaile (R) Tr. 44482.

[8] Griffin (R) Tr. 43922.

[9] Griffin (R) Tr. 43931-32.

"On the basis of that hypothetical question * * * there is no evidence that they (the marketing practices) were arrived at by conspiracy or collusion; on the contrary the very fact of freight absorption indicates to me that there must have been competition there."[10]

"In my judgment the practices * * * were not arrived at by collusion or conspiracy."[11]

"There were in those various hypotheses put before me certain ones which are not consistent with the condition of monopoly or collusion. * * * Those same hypotheses described a situation in which all of the conditions could not have arisen out of a state of monopoly or collusion."[12] Dr. Fairchild then enumerated these factors that indicated that collusion did not exist,—freight absorption; freedom to become a base mill; shrinking of mill nets on distant sales; competitors retaliating with further reductions if price is lowered; price wars; freedom to change price; efforts to retain good will of customers; secret price concessions, etc.[13]

Dr. Grether gave a similar list of factors that were inconsistent with collusion,[14] but was not permitted to complete his testimony thereon.[15]

Three of the Commission witnesses (Drs. Hibbard, Duddy and Nourse) were not questioned as to the marketing method being based on collusion or conspiracy. Dr.

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[10] Westerfield (R) Tr. 45664-65.

[11] Grether (R) Tr. 45808-09.

[12] Fairchild (R) Tr. 44832-33.

[13] Id., Tr. 44841-76.

[14] (R) Tr. 45940-6060.

[15] Tr. 46136-40.

Viner in portions of his testimony virtually agreed with the respondents' economists.[16]

Dr. Fetter, a Commission witness, testified that the marketing method is essentially and necessarily collusive, and went so far as to testify that if Belgian cement were offered in this country at a lower price, and the American producers then quoted the same low figure "it would raise a very grave suspicion" that they were colluding with the Belgian producers.[17]

The respondents' economists testified as to the effects of this marketing method as follows:

1. It facilitates the meeting of local fluctuations of demand.[18]

2. It does not restrict competition in price.[19]

3. It does not increase the cost of producing and distributing the product.[20]

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[16] Dr. Viner testified: "If this hypothetical industry were under complete and unified monopoly control, it is certain that they would not, of their own accord, establish such a price structure as they now have; a price structure (such) as we now have in the cement industry cannot be explained in terms of deliberate choice among available alternatives." ((C) Tr. 15702-03) Varying mill nets "could be consistent with the absence of any agreement or understanding between producers only if the producers were all scattered geographically so that each producer was protected in his own immediate vicinity by the cost of transportation thereon from the nearest other producer." ((C) Tr. 15814-15)

[17] (C) Tr. 18143.

[18] Westerfield (R) Tr. 45534; Griffin (R) Tr. 42984-85; Vaile (R) Tr. 44107-08; Grether (R) Tr. 45831.

[19] Griffin (R) Tr. 42998-3000, 43620, 43624; Vaile (R) Tr. 44126, 44134; Grether (R) Tr. 46016.

[20] Griffin (R) Tr. 43000-01.

4. It is a method that would be effective in keeping prices down to a reasonable margin above costs.[21]

5. It is a method that does not have to be policed in order to be maintained.[22]

13. Other Effects of Basing-Point

a. Effect Upon Poorly-located Plant

"A plant may be poorly located from either of two principal points of view: one, poorly located relative to market, and the other, poorly located relative to the factors of production, such as raw materials, labor supply, power, and so on."[1] "All that can be said is that the present plan would tend to reduce the disadvantage of being poorly located relative to market. Certainly no one under the present plan would deliberately locate a plant poorly relative to market, because it would mean that he would have to sell most of his products on a freight-absorbing basis."[2]

"This method permits other competitors to come into this mill's territory by freight absorption, whereas under an f.o.b. basis that would not be possible. Therefore, to that extent, this method, so far from helping the mill poorly located with reference to markets, is less helpful to it than the other."[3]

"The present method does not put an umbrella over a mill poorly located with respect to markets."[4]

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[21] Griffin (R) Tr. 42001-08; Fairchild (R) Tr. 44647, 45195; Westerfield (R) Tr. 45601.

[22] Westerfield (R) Tr. 45595, 45597; Vaile (R) Tr. 44135; Fairchild (R) Tr. 44643, 44744; Grether (R) Tr. 45839.

[1] Griffin (R) Tr. 43214.

[2] Id., Tr. 43214-15.

[3] Fairchild (R) Tr. 44649.

[4] Id., Tr. 45018. To same effect, Griffin (R) Tr. 43214-15.

b. Effect on Capacity

It would encourage excess capacity "no more than any other method of quoting prices * * * no more so than any other method of competition. Competition in many instances encourages over-capacity."[1]

"Under the present method of marketing I see no reason why in the long run you would not get the same capacity that you would * * * under the other" (i.e. the uniform f.o.b. mill plan).[2]

c. Benefits to Buyer

Basing-point is beneficial to the buyer of cement. "First of all, there is an advantage * * * to buyers who are able to buy on a quoted delivered price * * *. In the second place * * * where in certain territories as a result of freight absorption you get two sellers in a market where otherwise there would only be one, you have an advantage * * * that he may choose between the two sellers, he may play one off against the other. He may get, even though he gets no monetary price concession per unit of physical product, he may get certain other benefits from one seller that he can not get from the other; prompter delivery would be one, for example. * * * There might be numerous instances where he could get advantages because there were two people in the market."[1]

d. Does Not Cause Price Rigidity

The basing-point method does not cause price rigidity.

"I do not believe that the system described * * * makes for price rigidity, any more than a uniform f.o.b. mill plan of selling would."[1]

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[1] Vaile (R) Tr. 44113-14.

[2] Griffin (R) Tr. 43857.

[1] Vaile (R) Tr. 44120-21.

[1] Westerfield (R) Tr. 45583-84.

"In my opinion the system arises out of the conditions of the industry * * * and when you come to a particular pricing method, it seems any other method would, in itself, likewise, under the conditions of the industry, show considerable rigidity."[2]

"It is not the method of quoting prices that gives rise to the rigidity, but the other things that we have spoken of,—inelastic demand, small numbers of operators operating in their own best interest, and items of that sort,—rather than the method of quoting prices * * *. The rigidity of prices is a natural result of a competitive situation in any industry such as is described, in my opinion."[3]

14. Historical Development of Marketing Method

The historical development of the marketing method was set forth in the following assumptions, which were then used as the basis for several questions propounded to each of these economists:

> "* * * let us assume that the following description is the general story of the development of the marketing methods used in the cement industry: The manufacture of Portland cement in the United States commenced in the latter part of the Nineteenth Century. Around 1870 several mills were built in the Lehigh Valley in the northeastern part of Pennsylvania where there was a deposit of a so-called cement rock. Until about 40 years ago most Portland cement used in the United States was imported from Europe, and moved into the interior from the Atlantic seaboard. Most of this imported cement was sold to distributors f.o.b. dock. The distributor shipped the cement to the point of use, where he resold the cement to the ultimate consumer at a delivered price. At that time foreign produced

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[2] Grether (R) Tr. 45874.

[3] Vaile (R) Tr. 44200.

cement was considered by most purchasers to be superior to domestic cement.

For a time it was commonly believed that the Lehigh Valley was the only locality in the United States where high quality cement could be made. After some years it was discovered that a satisfactory Portland cement could be manufactured elsewhere by blending various materials. Thereafter mills were built in various parts of the country, so that today there are approximately 150 mills scattered throughout the United States. Originally, some brands of Portland cement sold at a premium over other brands, but all domestic Portland cements have for over 25 years exceeded the published minimum standard specifications and for over 20 years customers have refused to pay more for one brand than another. In the early days the Lehigh Valley mills shipped cement all over the United States. At first domestic Portland cement was sold usually f.o.b. mill to cement distributors, who resold to cement dealers and consumers at a price f.o.b. point of use; freight has always been a substantial part of the delivered cost. Some of the new western mills sold direct to dealers and consumers, and when dealers were sold at or about the same price as distributors, the latter gradually died out and have not generally existed for the past 25 years. The competition by these new mills was continued, and prices were reduced by the Lehigh Valley mills. The older manufacturers slowly eliminated their distributors and made their sales direct and they took over the marketing practices, as well as the functions of the distributors. With the elimination of the distributor, there were three major factors leading to the selling at delivered prices, and that these were (1) the manufacturer stepped into the shoes of the distributor who had been selling at delivered prices, (2) dealers requested delivered prices or information so they could compare delivered costs, and (3) the necessity of meeting competition of newer mills. Dealer customers, being used to delivered prices from distributors, requested either delivered prices or information as to the amount of freight charges; cement continued to be sold in

some instances f.o.b. mill with the freight costs to point of delivery in cents per barrel often set forth in the quotations made by various manufacturers and in other instances f.o.b. destination. With the inception of this practice by a few manufacturers, purchasers usually requested cement prices on a delivered basis. Gradually most manufacturers acceded to the dealers' requests. Prices on cement came usually to be quoted and sales made on a delivered price basis.

As new mills were built in the Middle West and successively in other parts of the country which were nearer freightwise to various consuming markets than the Lehigh Valley mills, these new mills found that buyers purchased cement from that company which sold at the lowest delivered cost, so that the western mills either met the competition of the older Lehigh Valley mills by quoting delivered prices which were as low as the prices quoted by the Lehigh Valley mills or quoted lower prices. Some of the Lehigh Valley mills met the lower prices of the new mills by reducing their prices at such destination points. This process was repeated in many instances until one, and later a number, of these new mills quoted delivered prices which usually represented the sum of some fixed figure at the new mill point plus freight to destination. At first some of the Lehigh Valley mills attempted to meet this new competition by using varying and different f.o.b. mill prices in quoting for sales to purchasers at destinations nearer freightwise to the new mills than to the Lehigh Valley mills. Some of the eastern mills found that the practice of varying their f.o.b. mill prices resulted in customers' complaints and loss in good will, and made it difficult to meet the competition of the delivered prices quoted by the new western mills. As a result, they met the delivered prices quoted by their western competitors by quoting delivered prices. These prices usually reflected the sum of some base at a new mill plus freight to destination. As new mills were built throughout the country this process was repeated as to some of the mills which made their delivered

prices the sum of some base at their mill plus freight to destination, thus making their mills basing points, while some of the new mills did not make themselves basing points but quoted delivered prices to meet the prices quoted by competing mills; that such non-base mills are generally small mills or distant from large consuming markets.

About 1910 the practice of broadcasting quotations to customers and prospective customers was initiated by one manufacturer and thereafter other manufacturers also distributed printed quotations to the trade.

Cement prices generally came to be quoted on a delivered basis. From 1900 until 1930 the volume of cement consumed in the United States steadily increased. There has been from time to time an actual shortage of available cement in various markets. New mills were built either to meet the increased demand or as promotional ventures. Mills have usually been built at the site of satisfactory raw materials. Such materials are heavy and expensive to transport for any distance. Most mills are systematically kept up to date with the newest equipment. The product has been improved in quality. Such improvements in the product have increased costs of production. Many manufacturers have gone into bankruptcy and mills have been abandoned." (Tr. 42975-79)

These witnesses testified that:

1. The economic development described did not preclude the existence of free competition.[1]

2. The development described is one that you would normally expect to find in an industry of this type.[2]

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[1] Griffin (R) Tr. 42980; Vaile (R) Tr. 44104; Fairchild (R) Tr. 44624; Westerfield (R) Tr. 45521; Grether (R) Tr. 45818.

[2] Griffin (R) Tr. 42980; Vaile (R) Tr. 44105; Fairchild (R) Tr. 44624; Westerfield (R) Tr. 45522; Grether (R) Tr. 45818.

15. The Waste of Cross-Hauling

These economists testified on various phases of the alleged waste of cross-hauling caused by basing-point.

Cross-hauling and freight absorption are not synonymous.[1]

If the two shipments differed in color and the customer had a preference for one, or if there was a customer-preference for a particular brand, it would not constitute cross-hauling.[2]

The two shipments must be made at approximately the same time.[3]

Consequently, these witnesses testified, it would be very difficult, if not impossible, to determine the amount of real cross-hauling in an industry such as this.[4]

All competition involves certain wastes. "There are a number of so-called wastes of competition. * * * A number of these grow out of the nature of the competitive system, and must gain their justification from the assumed inherent advantages of the competitive system. * * * I would include cross-hauling as an example of just this sort of thing."[5] "Competition always involves more or less waste of this sort. From the point of view of the national economy, those wastes are justified by the advantages of

[1] Griffin (R) Tr. 43083; Fairchild (R) Tr. 44748; Westerfield (R) Tr. 45566. Dr. Viner conceded that all instances of freight absorption are not cross-hauling. ((C) Tr. 15785)

[2] Griffin (R) Tr. 43085-86. Dr. Viner conceded that "if the cross-hauling could be explained in terms of preferences of that sort * * * then I would not call it cross-hauling." ((C) Tr. 15788)

[3] Griffin (R) Tr. 43083-84. Dr. Viner conceded that if Mill A ships into Mill B's area in January and Mill B ships into Mill A's area in July, "I would certainly say it doesn't demonstrate cross-hauling." ((C) Tr. 15786)

[4] Griffin (R) Tr. 43088; Fairchild (R) Tr. 44748.

[5] Griffin (R) Tr. 43075-76.

competition * * * (which) definitely outweigh the disadvantages of the wastes that it may necessarily involve.'"[6]

The waste of cross-hauling is not limited to basing-point industries.[7]

Cross-hauling is an important factor indicating competition and tending to negative collusion.[8]

If cross-hauling were to disappear without governmental compulsion, it would be indicative of collusion.[9]

16. Price Rigidity

Price rigidity was defined as "a relatively small variation as to amplitude and relatively infrequent in variations."[1]

One important cause of price rigidity is inelasticity of demand.[2]

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[6] Fairchild (R) Tr. 44647-48. To the same effect, Westerfield (R) Tr. 45564-66. Dr. Viner conceded that he was unable to say that cross-hauling is a greater waste than the others. ((C) Tr. 15795-96)

[7] Vaile (R) Tr. 44328-30. Dr. Viner testified "I would expect to find it in any industries which sell on a delivered price basis and which have market areas having boundaries at which their delivered prices are equal to the delivered prices of some other mills elsewhere located, and who, nevertheless, solicit business outside their market areas." ((C) Tr. 15796-97)

[8] Westerfield (R) Tr. 45570.

[9] Westerfield (R) Tr. 45569. This was conceded by Dr. Viner,—(C) Tr. 15804.

[1] Griffin (R) Tr. 43028-29. Dr. Viner testified, "I know that prices are much more variable than they seem from the ordinary published lists of prices * * *. Actual prices are the scarcest of information." ((C) Tr. 15747-49)

[2] Griffin (R) Tr. 43058-60; Vaile (R) Tr. 44189-90; Fairchild (R) Tr. 44700-01; Grether (R) Tr. 45875.

Where a product such as cement is a minor component part, as in building construction, there is a resultant strong tendency toward price rigidity.[3]

Price rigidity is also a result of a homogeneous commodity and the knowledge that competitors will promptly meet a price reduction.[4]

High overhead costs also contribute to cause price rigidity.[5]

Another cause is the fear of a price war.[6]

The result is frequently a "state of price equilibrium."[7]

In the cement industry there are certain customary practices that also contribute to produce price rigidity,—the custom of giving several days notice of the effective date of a price advance, and to accept orders during that period and permit stocking-up by customers at the lower price;[8] the existence of contract obligations to deliver cement, with a clause giving the buyer a reduced price if price declines;[9] the custom of giving a rebate to dealers on all recent purchases if price declines;[10] and the fact that companies operating several mills (so-called "chain-

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[3] Westerfield (R) Tr. 45585-87; Vaile (R) Tr. 44193, 44196-97.

[4] Griffin (R) Tr. 43029, 43045-46; Vaile (R) Tr. 44188; Grether (R) Tr. 45866; Westerfield (R) Tr. 45593-94.

[5] Griffin (R) Tr. 43041-42.

[6] Grether (R) Tr. 45873; Westerfield (R) Tr. 45592; Griffin (R) Tr. 43036.

[7] Fairchild (R) Tr. 44693.

[8] Vaile (R) Tr. 44204; Grether (R) Tr. 45870; Westerfield (R) Tr. 45590.

[9] Griffin (R) Tr. 43030-31; Vaile (R) Tr. 44203; Fairchild (R) Tr. 44702; Westerfield (R) Tr. 45588-89; Grether (R) Tr. 45867-69. (Conceded by Dr. Fetter (C) Tr. 18409-10)

[10] Fairchild (R) Tr. 44705-06; Vaile (R) Tr. 44204-05; Westerfield (R) Tr. 45590-91; Grether (R) Tr. 45870-71.

mill companies") find it necessary to drop prices at all mills if price is dropped at one mill.[11]

Price rigidity does not create an inference of collusion.[12] "I see no reason why, under conditions of imperfect competition such as prevail in the cement industry, there might not be a state of equilibrium reached which no competitor will wish to change for a considerable period of time. At any rate, it would not be possible to infer a condition of collusion or absence of competition. * * * Cement is produced under conditions of imperfect competition, where you do not find normally that constant fluctuation of prices meeting every variation in conditions of demand and supply."[13] "If there were collusion, I would surmise that people who are colluding would not be interested in having a fixed price for five years, but would be experimenting with other prices."[14] There is no advantage to the monopolist in a rigid price.[15]

17. Continuance of Basing-Point

Could an individual manufacturer in an industry that is using a basing-point method, discontinue its use? What would be the economic results to him?

"If any one mill on its own initiative went over to the uniform f.o.b. mill basis, its position would be untenable * * *. To hold all of its sales, it would have to make its f.o.b. mill equal to the lowest delivered price it was getting plus freight, which would make so drastic a reduc-

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[11] Griffin (R) Tr. 43044-45; Vaile (R) Tr. 44205-06; Westerfield (R) Tr. 45593; Grether (R) Tr. 45871.

[12] Westerfield (R) Tr. 45593; Grether (R) Tr. 45873-74; Griffin (R) Tr. 43221-23.

[13] Fairchild (R) Tr. 44770-75.

[14] Westerfield (R) Tr. 45593. To same effect, Grether (R) Tr. 45873-74; Griffin (R) Tr. 43221-23; Vaile (R) Tr. 44208-09.

[15] Griffin (R) Tr. 43223; Vaile (R) Tr. 44208-09.

tion * * * that I should think the result would be ruinous * * *. Its competitors would still be free to invade its territory on a freight absorbing basis * * *. Any one mill which undertook alone to make this change would find it so much a cause of loss that it would quickly retrace its step and go back to the former base pricing system."[1]

"If one manufacturer abandoned the delivered system of prices and went over to the f.o.b. method, his freight-absorbing sales would be lost. The sales where there had been no freight absorption, possibly, need not be affected, except that in this territory he would still be subject to a penetration of his market by competitors."[2]

18. Dealer Relationships

Each of these economists was asked certain questions based upon the following assumptions,—

> "Assume that in the cement industry a large majority of the cement is sold to dealers, so that dealers as a class have been characterized as the backbone of the industry; and assume that some manufacturer offered to dealers some marketing practice that would seem to dealers more advantageous to them than the practice formerly followed by this manufacturer or by his competitors, such as a more favorable discount, or a classification of business that gave the dealer a large proportion of the manufacturer's business than other manufacturers were giving him."[1]

On the basis of these assumptions, the first question asked these expert witnesses was,—

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[1] Fairchild (R) Tr. 44722-23.

[2] Westerfield (R) Tr. 45530-31. To the same effect, Griffin (R) Tr. 43153-55; Grether (R) Tr. 45550-52. Commission witness, Dr. Fetter, also testified, "They have gotten into an impasse, an uneconomic practice, from which individually and separately they are unable to extricate themselves." ((C) Tr. 18014)

[1] Tr. 43092.

"What would be the economic result to another manufacturer who did not change his practice so as to give at least equal advantage to his dealers?"

The replies were,—"I should think that, other things being equal, the manufacturer who did not make such a change would lose patronage thereby."[2] "There is an economic necessity if several sellers are appealing for the patronage of given buyers that their offers shall be equally attractive. * * * There is a tendency for these services to become identical between competing sellers."[3] "There is a definite pressure toward uniformity."[4] "I think there is an economic necessity that competitors will strive to meet those practices of their competitors so far as they can."[5]

The resultant uniformity of practices does not justify an inference of collusion.[6]

19. Diversion in Transit

Each of these economists was asked certain questions based upon the following assumptions,—

> "Assume that a cement manufacturer usually sells his cement at delivered prices; that the great majority of his sales are to dealers; that a number of competitors are actively soliciting the purchases of each dealer in the territory in which this company does business; that dealer good will is a valuable asset to this manufacturer; and assume that this manufacturer sells in Town 'A' at a delivered price of $2 a barrel, on which sale he nets, after deducting freight rate, $1.50 per barrel; and as-

[2] Griffin (R) Tr. 43093.

[3] Id., Tr. 43092-93.

[4] Vaile (R) Tr. 44187.

[5] Fairchild (R) Tr. 44708. To same effect, Westerfield (R) Tr. 45581.

[6] Fairchild (R) Tr. 44707; Westerfield (R) Tr. 45581-82.

sume that this manufacturer sells in Town 'B' at a delivered price of $2 a barrel, from which he nets $1.20 a barrel at his mill; and assume that in each case the dealer pays to the railroad the amount of the freight and remits the balance to the manufacturer; and assume that a dealer in Town 'B' orders cement to be shipped to that town, and after the cement is delivered to the railroad the dealer diverts the shipment in transit to Town 'A', paying the railroad the 50 cents freight due for shipment from the mill to Town 'A' and remitting to the manufacturer $1.20 per barrel, which was the mill net due to the manufacturer on a shipment to Town 'B', so that this Town 'B' dealer now has this cement in Town 'A' at a cost of $1.70 to him. Now, assume that this Town 'B' dealer now sells this $1.70 cement in competition with the manufacturer's customers in Town 'A', whose cement is costing $2; and assume that the manufacturer's local dealers in Town 'A' complained to the manufacturer, and in some instances threaten to discontinue doing business with him, and the manufacturer adopts a policy of preventing such diversions.'"[1]

Question No. 1—"Would you, as an economist, say that this action is or is not consistent with individual action in the individual company's self-interest?" The answers were all in the affirmative. For example, "I see nothing in those assumptions that would lead me to any conclusion that that action was not wholly taken by the particular mill in following out of its own individual self-interest."[2] "A manufacturer is dependent upon dealers for business. If the majority of his dealers object to a policy, he has to make up his mind whether he wants to lose the majority of his dealers or continue doing business with them."[3]

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[1] Tr. 44218-19.

[2] Fairchild (R) Tr. 44687-88.

[3] Grether (R) Tr. 45863. See also Griffin (R) Tr. 43104-06, 43108; Vaile (R) Tr. 44220; Westerfield (R) Tr. 45576-79.

Question No. 2—"If, after one individual manufacturer discontinued allowing dealers to divert cement, other manufacturers discontinued permitting diversions in transit, would you as an economist say that this would raise an inference of collusion?" To this all answered in the negative. "An economist could not draw such an inference."[4]

20. Sales to Trucks f.o.b. Mill

A series of questions were propounded to these economists based upon the following assumptions,—

> "Assume that the most important customers of a particular cement manufacturer are its dealers, and these dealers in any one locality are in competition with one another in the retail distribution of cement; assume that cement is usually sold at delivered prices; that a cement manufacturer upon request sold cement for delivery to trucks at an f.o.b. mill price; that a few of its dealers took truck delivery of cement; that such dealers from time to time invaded the normal market area of other dealers of this company, and that these local dealers complained to the company and threatened to discontinue doing business with it; assume that a few of its dealers were able through trucking to deliver the cement at a lower delivered cost than competing dealers of the same locality, and that the latter complained to the manufacturer; assume that a great majority of this manufacturer's dealers were strongly opposed to truck delivery and urged it to discontinue sales for truck delivery; assume that another important class of its customers were railroads; that they were dissatisfied with the traffic that they were losing from truck deliveries and urged this cement company to discontinue sales to trucks; assume that the company's mill was equipped to load cement on cars, and that the cost of loading in trucks was usually greater than that of loading on

[4] Griffin (R) Tr. 43110. See also Griffin (R) Tr. 43479; Vaile (R) Tr. 44221; Fairchild (R) Tr. 44690; Westerfield (R) Tr. 45579-80; Grether (R) Tr. 45865.

cars; and further, that loading on trucks had a tendency to cause labor dissatisfaction because of irregularity of shipping operations. If, under these conditions, this manufacturer who had been making deliveries to trucks at an f.o.b. mill price changed his practice in any one of the following ways; to wit,—(1) by refusing to make such deliveries to buyers' trucks; (2) by refusing to make deliveries to buyers' trucks, and in place thereof offered to make deliveries by trucks either owned by him or by a contract trucker at the same delivered price as charged for deliveries by rail; (3) continued to make deliveries to buyers' trucks, but charged a differential for loading such trucks; (4) continued to make deliveries to buyers' trucks, but charged a price equal to the delivered price as quoted for rail delivery.'"[1]

Question No. 1—"To you, as an economist, is such action consistent, in your opinion, with individual action in the individual company's self-interest?" All answers were in the affirmative. "It would seem to me that any one of these actions might quite naturally be taken by a company under the conditions assumed on account of its own individual interest."[2] "It is quite normal for a manufacturer to react to the demands of a majority of his customers, especially if they are important dealers."[3]

Question No. 2—"If the manufacturers that are competing with the manufacturer who has adopted one of said practices should in their turn adopt the same practice, would such action, to you as an economist, raise an inference of collusion?" All answered in the negative. "No, I think not, because of the tendency * * * of bringing trade practices into line, under conditions of competition, with

[1] Tr. 43100-02.

[2] Fairchild (R) Tr. 44653. To same effect, Griffin (R) Tr. 43102; Vaile (R) Tr. 44224; Westerfield (R) Tr. 45574.

[3] Grether (R) Tr. 45846.

the desires of the buyers."[4] "He must meet the competitive practices of his competitors if he is to hold any patronage."[5]

Question No. 3—"If this manufacturer, having changed to one of the four alternatives stated, should thereafter change to another of said alternatives, or revert to his original practice, to you as an economist is such action consistent with individual action in the individual company's self-interest?" The answers were all in the affirmative.[6] "It is quite the thing * * * for a business enterprise to experiment with its policy until it strikes the best policy."[7]

Question No. 4—"If thereafter other competing manufacturers should adopt the same practice, would such action raise an inference of collusion?" All answered in the negative.[8]

21. Identity of Other Marketing Practices

The following question was asked these economists,—

> "Assuming that other marketing practices, such as discounts, classification of business between sales to dealers and sales direct to consumers, and so forth, are uniform as between competing manufacturers, will you state whether or not such uniformity raises, to you as an economist, an inference of collusion?"

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[4] Griffin (R) Tr. 43102-03.

[5] Vaile (R) Tr. 44224-25. To same effect, Fairchild (R) Tr. 44653; Westerfield (R) Tr. 45576; Grether (R) Tr. 45847-48.

[6] Griffin (R) Tr. 43103; Vaile (R) Tr. 44224; Fairchild (R) Tr. 44653; Westerfield (R) Tr. 45575.

[7] Grether (R) Tr. 45847.

[8] Griffin (R) Tr. 43103; Vaile (R) Tr. 44225; Fairchild (R) Tr. 44654; Westerfield (R) Tr. 45576; Grether (R) Tr. 45848-49.

The answers again were all in the negative.[1] "No. There would be strong competitive forces tending to bring them into line."[2] "You are really asking me to evaluate a very common practice in American industry, namely, of sales terms coming to be uniform throughout a trade."[3] "The tendency toward uniformity of such sales practices as those seems to me to be economically of no different character than the tendency toward uniformity in price."[4]

22. Identical Sealed Bids

These economists were asked certain questions based on the following assumptions,—

> "Assume that on sealed competitive bids to governmental bodies, experience has shown that the final award is made on the basis of total cost at point of use, including freight; that it has, on a number of occasions, happened that when, on competitive bids, one company bids a price lower than its competitors, the business is not awarded to such low bidder, but sometimes after such low bid is made public, all bids are thrown out and new bids are asked, when all bidders bid as low or lower than the original low bidder; and that it has also happened that the governmental agency has permitted other bidders to reduce their prices without a new letting, either to meet the original low price or to make an even lower price; and assume that it has happened that when a company has bid on a competitive governmental letting a price less than its going commercial price at the destination in question, a competitor has usually reduced his commercial prices, so that such reduced governmental price has often or usually been followed by a general reduction in commercial prices."[1]

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[1] Fairchild (R) Tr. 44708; Vaile (R) Tr. 44187.

[2] Griffin (R) Tr. 43094.

[3] Id., Tr. 43469.

[4] Fairchild (R) Tr. 44708.

[1] Tr. 43111-12.

Question No. 1—"Can you as an economist state what price you would expect a manufacturer to bid on a sealed bid to a governmental body?" The witnesses answered in substance that they would not expect him to bid lower than the regular commercial price.[2] "I should think that ordinarily under these conditions a manufacturer would hesitate to make a sealed bid to the government a price lower than the lowest price he expected would be set by whatever base mill governed the price at this particular destination."[3]

(Commission witness Dr. Fetter in substance corroborated this.[4])

Question No. 2—"If on such sealed bids all companies bid the same delivered price, does such uniformity of price raise an inference of collusion?" The answers were in the negative.[5] "It seems to me that it is just as compatible with individual competitive action for the prices offered the government to be uniform as the prices offered any other buyers to be uniform, and I have already stated that that latter seems to me clearly to be a natural competitive action in the individual's attempt to realize his own best interest * * * I would not infer collusion from such action."[6]

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[2] Vaile (R) Tr. 44240; Westerfield (R) Tr. 45554. This question when propounded to Dr. Griffin (R) Tr. 43111-16, was excluded, and an offer of proof duly made.

[3] Vaile (R) Tr. 44680.

[4] Dr. Fetter testified (C) Tr. 18494),—"I think that most competitors or all true competitors who are not conspiring or consulting have to make shrewd guesses as to what the bid of others will be; especially, of course, in sealed bids."

[5] Griffin (R) Tr. 43114; Grether (R) Tr. 45859; Fairchild (R) Tr. 44683-84.

[6] Vaile (R) Tr. 44240-41.

Question No. 3—"If a manufacturer elected to bid f.o.b. mill, how would you expect him to compute his f.o.b. mill bid?" The following answer is typical,—"I would expect them to determine * * * the f.o.b. mill price by taking the commercial price and deducting from that the freight rate to the point of delivery."[7]

If the f.o.b. mill bids were thus made, the economist would expect the "destination costs" (i.e., the f.o.b. mill bids plus their respective freight rates to destination) to be identical.[8]

As to identity which extends to six or seven decimal places in identical bids (where land-grant freight rates are involved), these economists saw no difference in such identity. "If they are identical to one decimal point, they can be identical to seven or seventeen * * * I would not think there is any difference * * *. If the forces of the market tend to bring about—do bring about—identical bids, then it seems to me the case is not made stronger by saying they are two decimal points instead of one, or three instead of two."[9]

Question No. 4—"Would such identity of destination costs on such sealed f.o.b. mill bids, raise an inference of collusion?" All these economists answered in the negative.[10]

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[7] Griffin (R) Tr. 43114. To same effect, Fairchild (R) Tr. 44684; Vaile (R) Tr. 44241; Westerfield (R) Tr. 45555; Grether (R) Tr. 45859.

[8] Vaile (R) Tr. 44242; Griffin (R) Tr. 43115; Fairchild (R) Tr. 44684; Westerfield (R) Tr. 45555; Grether (R) Tr. 45860.

[9] Griffin (R) Tr. 43769. To same effect, Fairchild (R) Tr. 45173-74.

[10] Griffin (R) Tr. 43115; Vaile (R) Tr. 44242-43; Fairchild (R) Tr. 44685; Westerfield (R) Tr. 45555-56; Grether (R) Tr. 45860-61.

The witnesses were next questioned upon the following assumptions,—

> "Asume that cement manufacturers learned that buyers of cement, both public and private, ordinarily determine their purchases between competitive sellers on the basis of cost to the buyer at destination, and that manufacturers with knowledge of that have generally refused to bid or quote f.o.b. mill and without reference to the cost to the buyer at destination."

Question No. 5—"How would you, as an economist, account for this attitude on the part of the seller?" The following answer is typical of the others,—"I would say that such refusal could well be explained by the unwillingness of a manufacturer to depart from a method which he believed was desired by most of his buyers. That is not an uncommon phenomenon in business."[11]

Question No. 6—"Does such refusal to bid an f.o.b. mill price justify an inference of collusion?" All answered in the negative.[12] "I do not see how any economist could draw an inference of collusion or agreement from that fact."[13]

Question No. 7—"Under the conditions that have been assumed in these last questions as prevailing on competitive bids, and assuming further that the dealer business is the backbone of the cement business, and that dealers learn of prices to governmental authorities and demand an equally low price, would you expect a cement company to make a specially low price on a government invitation involving a large quantity of cement?"

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[11] Griffin (R) Tr. 43123. To same effect, Westerfield (R) Tr. 45556; Grether (R) Tr. 46030-31.

[12] Westerfield (R) Tr. 45556; Vaile (R) Tr. 44247-48; Griffin (R) Tr. 43123-24; Fairchild (R) Tr. 44654-55.

[13] Griffin (R) Tr. 43123-24.

The economists replied, typically,—

"Under the assumptions placed before me in that question, I would not expect them to make a low price to the Government."[14]

23. Basing Point is in the Public Interest

These economists were asked whether the present method of marketing cement is in the public interest. Their answers were in part as follows,—

"Under the assumption that * * * free competition is deemed to be in the public interest, then I should say that this method of quoting market prices, since it is a competitive method, is in the public interest."[1]

"This method of marketing is one in harmony with competition; it therefore would tend to promote the production and marketing of cement under a condition which would in the long run tend to produce cement and deliver it somewhere near its cost of production."[2]

"As I think of the public interest * * * I should say that that interest is best served when such manufacturing and marketing is in the hands of private enterprise, and is operating under conditions of competition. It is my opinion that the basing-point method as it has been described in various hypotheses before me, contributes toward competition, and is more in harmony with competition than any alternative method of marketing which I can conceive of as being practicable for an industry of this sort. I draw the conclusion, therefore, that the present basing-point method of distribution is not contrary to the public interest, but, so far as the hypotheses before me go, is definitely favorable to the public interest."[3]

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[14] Vaile (R) Tr. 44843. To same effect, Griffin (R) Tr. 43119; Fairchild (R) Tr. 44685; Westerfield (R) Tr. 45556.

[1] Vaile (R) Tr. 44304.

[2] Fairchild (R) Tr. 44647.

[3] Id., Tr. 44811-12.

"I feel that meeting competition is the best protection in the public interest.[4] * * * Meeting competition is * * * just a method of stating that there is competition, and I believe that there is a presumption among economists that competition is best for the public interest. * * * Among other things it tends to keep the price down to the cost of production, and tends to assure to industry earnings that are normal to the industry. * * *"[5]

24. Disagreement With Commission's Economists

The respondents' economic witnesses were in complete disagreement with the economists who testified for the Commission. In certain cases the answer of the Commission's economist was read and they stated their disagreement; in other cases the same question was asked that had been propounded to the Commission's economist, eliciting from the respondents' economist an answer opposed to that of the Commission witness. The principal points of disagreement were as follows,—

a. Inferences of Collusion

1. Dr. Viner was asked,—

"Suppose you had a case where a base price at one figure were in effect on one side of a state line and a different base price in effect immediately on the other side of the state line and both of those base prices being put into effect by one base mill and recognized and observed and followed by its competitors. What competitive theory exists on which that could be explained?"

Dr. Viner answered,—

"That sort of a pattern would demonstrate to me that there was an understanding of some sort in

[4] Westerfield (R) Tr. 45600.

[5] Id., Tr. 45601.

that industry that a leader was to be followed with respect to price in a certain area. * * *"[1]

The respondents' economists expressed their disagreement as follows,—

(Prof. Fairchild) "I would be quite unable to draw an inference * * * that there was collusion or combination, because I can readily conceive of circumstances which might bring about just that situation. * * * I can conceive that this mill in question may have for reasons which are not stated * * * have decided that it was to its own interest. * * * Then I would expect the other mills to conform to this. I think not only would it be possible for them to do so without collusion, but virtually inevitable that they should do it * * * and so I do not see any necessity * * * of inferring collusion."[2] "As regards Dr. Viner, * * * I think his inference is incorrect * * * I do not regard his inference as a logical or reasonable one from the hypotheses before me."[3]

(Prof. Westerfield) "It is consistent with competition, and it is simply a price pattern prevailing in one state and another price pattern prevailing in another state."[4]

(Prof. Grether) "It seems to me quite reasonable to assume that a mill, say, in meeting competition * * * could work out such a price structure * * * If there were a general understanding in the industry, more likely you would have a single price rather than a dual price structure."[5]

(Prof. Griffin) "The assumption is made * * * that one mill has the power * * * to determine a base price in a

[1] (C) Tr. 15644.

[2] (R) Tr. 44767-69.

[3] (R) Tr. 45323-24.

[4] (R) Tr. 45582.

[5] (R) Tr. 45902-06.

certain area. That area apparently runs over a state line. If they have that power, then they can, if they wish, fix one base price up to the state line and another base price on the other side of the state line. Now, I do not see that any agreement is required with other mills to accomplish that. The other mills must meet that base price as set by this mill * * * I do not see that an agreement is required to carry out such a practice."[6]

(Prof. Vaile) "I have seen exactly that situation occur in other industries where the cause of it was the peculiar * * * freight rate structure * * *. Even though there is a division at the state line, he can have that sort of a division * * * for his own convenience without collusion or agreement with anyone else."[7]

2. Dr. Fetter was asked,—

> "In your opinion, can the basing-point system of identical delivered prices exist or be maintained without some form of cooperation among competitors?"[8]

His answer was,—

> "It is my conclusion as a student of basing-point practice in various industries that it is of the essence of the basing-point practice that there is cooperation tantamount to an agreement. It requires a mutuality of behavior on the part of those engaged in the system. I have already indicated, in part, what it is that each one does or refrains from doing. The basing-point mill refrains from reducing its price to prevent raids into its territories; it permits the outsider to match the governing price there; and in turn, the other mill, when its territory is in-

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[6] (R) Tr. 43210-11.

[7] (R) Tr. 44342.

[8] Tr. 17755.

vaded, does not behave like a competitor but like a conspirator.'"[9]

The respondents' economists' disagreement was expressed as follows,—

(Prof. Westerfield) "If it is invaded by an outside competitor, it must mean that some of the product of the outside competitor is being offered in its territory at a price, and this base mill must meet that price or not sell. Meeting of the price would not be conspiracy at all. It would be action, individual action, in individual self-interest; nothing more."[10] "It (the basing-point system) is not dependent upon cooperation. It can be as well dependent upon individual action under self-interest."[11]

(Prof. Fairchild) "It would not be my conclusion that it is the essence of basing-point practice that there is cooperation and agreement. It is my conclusion that the basing-point system is a natural method which might very well arise out of conditions of competition without collusion or agreement. I am not quite sure what is meant by 'mutuality of behavior', but assuming that it implies something in the way of agreement or collusion * * * when a mill refrains from reducing its price, whether or not in connection with the raids of competitors into its territory, I infer that that mill is acting according to its own judgment as to what is to its own best interest, and collusion would not be inferred from the fact that after a raid into its territory by a competitor which met its price, this particular mill chose to stand pat on that delivered price. * * * It is clear to me that a competitor may, under certain conditions, decide in his own best interest not to lower his price at a certain destination, but

[9] (C) Tr. 17757.

[10] (R) Tr. 45597-98.

[11] (R) Tr. 45597.

I would draw no inference whatever that he was acting like a conspirator in so doing."[12]

(Prof. Vaile) "It seems to me the most natural thing in the world under the assumptions put before me concerning the nature of this industry with a relatively small number of individual firms, with fixed geographic location * * *, with consuming markets that are distant * * *, —that under those circumstances once a price has been named by one strong seller in a particular consuming market, for others to meet that price, and it seems to me it takes no agreement or collusion or anything else of that nature * * * I see nothing in the situation as described which suggests to me that the other sellers in meeting the price * * * are acting like conspirators. * * * It seems to me there is no way by which he can prevent an outsider from matching a price quite regardless of where he puts his price. * * * It is not in their interests to put that price so low that it will drive all other competitors out. * * * To do the latter would be * * * to attempt to act like a monopolist."[13]

(Prof. Griffin) "I do not believe that it (the basing-point practice) requires agreements. * * * I do not see how a basing-point mill can prevent raids into its territory. The other mills at a distance always have the privilege of selling in this territory on a freight absorption basis. Now, the basing-point mill can discourage that practice by lowering the base price, but that of course, is at a cost to them and there will be a balancing of the advantage on the one hand of * * * discouraging the invasion, * * * and on the other hand of lowering the mill price. * * * It is not a case of * * * the base mill permitting the outside mill of matching their price. They have no way of preventing them * * * except * * * by lowering

[12] (R) Tr. 44808-10.

[13] (R) Tr. 44110-13.

the mill price, but that is a costly procedure and may lead to bankruptcy. * * * It (the basing-point) does not require such cooperation (tantamount to an agreement)."[14]

(Prof. Grether) "If by those words (i.e. cooperation tantamount to agreement) one means that the mills in their policies watch each other and adapt themselves to each other, * * * I will agree; but if it means something more formal than that,—joint control or joint agreement, then I would not * * * (As to 'mutuality of behavior'), You have mutuality of behavior in this sense, that one firm is watching another and adapting its policies to the other * * * if you call that mutuality of behavior, * * * it does not indicate to me that they necessarily have an agreement of any sort."[15] (As to not reducing price to prevent raids) "It seems to me it is a reasonable and rational behavior under the circumstances of the industry for the seller to act in this manner. In other words, I do not see in that any inference concerning conspiracy."[16]

b. Meeting Competitor's Price

Dr. Viner was asked.—"If the theory should be advanced that the system or method of pricing cement that I outlined in my long question is a method or system of meeting competition, what would you say as to that?"

He answered,—

> "I would say that if the term 'meeting competition' is supposed to be synonymous with a method of price competition, I would say 'no'. I would say it is a system of matching prices so as to avoid competition, and that in a system of that sort I would interpret a price practice of that sort as intended

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[14] (R) Tr. 43232-38.

[15] (R) Tr. 45910-11.

[16] (R) Tr. 45911.

to avoid price competition rather than as a routine carrying out the forces of competition."[1]

Dr. Fetter gave a similar answer.[2]

The respondents' economists expressed their disagreement with this opinion as follows,—

(Prof. Griffin) "I would not [agree]. It seems to imply that the meeting of a competitor's price is not a normal competitive act, but that the competitor ought to sell at a lower price. * * * I think the meeting of a price of a competitor * * * is a normal competitive act. * * * You cannot logically say that no man is a competitor unless he is always charging a lower price than his competitor, because then there is no end to that process."[3]

(Prof. Vaile) "I cannot accept that position. * * * The more nearly perfect your competition, * * * the only alternative * * * is to meet the market price."[4] "Competitive sellers always meet prices under the great majority of circumstances in a freely competitive market. The wheat farmer who sends his wheat on consignment to Chicago sells it at the market price. He does not offer it at a lower price than the market price; he meets the market price."[5]

(Prof. Fairchild) "I would not agree. * * * I cannot draw a distinction between meeting competition and competing. * * * If a mill * * * offers a lower price, * * * it is competing no more, no less, than if it met the price * * * Holding a price steady under the stress of forces which might be pushing everybody to raise it may be just as

[1] (C) Tr. 15640-41.

[2] (C) Tr. 17732, *et seq.*

[3] (R) Tr. 43309-10.

[4] (R) Tr. 44181.

[5] (R) Tr. 44337-38.

vigorous and drastic a thing as lowering a price under entirely different circumstances."[6]

(Dr. Grether) "When two or more firms, say, meet in market competition and if they are selling a standardized product, then, in competition, their prices will be uniform * * * You might call that, perhaps, matching the price but it is certainly meeting the competition, because they are forced to come to the same point in order to get the business."[7]

Prof. Westerfield testified similarly.[8]

c. Dumping

The respondents' economists did not disagree with Dr. Viner's characterization of freight-absorbing sales as analogous to dumping in international trade. They stated different conclusions, however, as to the effects of dumping.

"The direct effect of dumping upon the market in which the goods are dumped is presumably to lower the price in that market. * * * It presumably increases competition in that market. * * * [Freight absorption] does tend to have that same effect. * * * The effect of dumping in national trade tends to increase the number of sellers who are competing. * * * That would tend to have the effect of keeping prices in line with costs. Another possible effect would be through increase in volume to possibly lower costs."[1]

"It [dumping] increases the supply of the commodity offered for sale in that market, and consequently lowers the price. * * * The entrance of new sellers, new supply, has clearly an effect on competition."[2]

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[6] (R) Tr. 44761-63.

[7] (R) Tr. 45902; see also Tr. 45906-07.

[8] (R) Tr. 45497-98, 45504-05.

[1] Griffin (R) Tr. 43199-202.

[2] Vaile (R) Tr. 44345.

"The presence of high overhead costs is the basic condition which makes dumping profitable and possible. * * * The effect of dumping is to introduce a new competitor into that territory * * * and in the long run * * * would have a tendency to lowering prices."[3]

"It [dumping] adds to the supply there, and therefore has a depressing effect on the market. * * * He is able to keep his mill going, and the effects at the point of sale would be comparable in that more product is offered for sale."[4]

Dr. Viner testified that the systematic practice of dumping can occur only when there is monopoly control in the market at which the commodity is produced.[5]

With this conclusion the respondents' economists were in complete disagreement.

"A degree of imperfect competition * * * would be adequate to explain the practice."[6]

"I do not see why any individual concern, * * * finding it profitable, * * * would not go ahead and do it without getting into communication first with its competitors or by any combination or agreement or collusion with them."[7]

d. Dr. Fetter's Definition of "Price"

Dr. Fetter, when asked what was the "price" of cement under the pricing method as described in Counsel's long hypothetical question, testified as follows,—

> "The word 'price' as applied to a market, priced in and at a market, is a freightless price. It is a price which does not include an element of freight. The words 'delivered price' is a compound term

[3] Fairchild (R) Tr. 44756-57.

[4] Westerfield (R) Tr. 45543-44.

[5] (C) Tr. 15632-34.

[6] Griffin (R) Tr. 43202-03. See Vaile (R) Tr. 44346.

[7] Fairchild (R) Tr. 44758. See also Westerfield (R) Tr. 45544-45.

meaning both the price of the cement and the price of the freight necessary to transport the cement from the place at which it is sold to the destination. * * * I should say there is no 'price' in the ordinary economic sense. You are using the word 'price' in a different sense."[1]

[Dr. Fetter conceded on cross-examination that he knew of no other economist who includes the phrase "without inclusion of freight."[2] It should also be noted that Dr. Viner refused to endorse Dr. Fetter's concept of "price" being a freightless price, *i.e.*, equivalent to mill net, and testified, "If the commodity is sold *as of that mill*, then I would say the mill net is the price." (Italics supplied)][3]

The respondents' economists disagreed with Dr. Fetter's definition of "price" as being freightless (*i.e.* the mill net),—

(Dr. Griffin) "That line of reasoning implies that price is made up of a number of elements which can be added together to make price, and that those different elements are cost elements, and I do not think that an economist recognizes that price is simply the sum of cost elements. * * * You can't start with the raw material, and add to that the costs of processing the product, and then the freight, and finally come out to price. * * * That would be my first objection to it."[4] "Price is the thing which the consumer pays for the product. * * * The second point on which I would object to that definition is that it is almost universally recognized by economists that the value of any product arises from various utilities. One of these is form

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[1] (C) Tr. 17656.

[2] (C) Tr. 18269-70.

[3] (C) Tr. 15996.

[4] (R.) Tr. 43218-19. This testimony was corroborated by Dr. Viner, who testified, "I would say a price paid by a buyer can't be analyzed into inseparable parts." ((C) Tr. 15928)

utility; it is the thing itself. * * * Another one is place utility. We cannot think of a thing having value except as we think of it at a certain place. That price is a freight less thing seems to be implying that price is the amount that you pay for the thing itself regardless of place. Well, there isn't any such thing. * * * What you are buying is a bag of cement at a certain time and at a certain place, and what the buyer pays for that is the price of the thing he is buying."[5] "You cannot take price and subtract from it certain things in an effort to find what one might like to call true price. Price is what is paid."[6]

(Prof. Vaile) "I certainly do not agree with the testimony [of Dr. Fetter]. There are very few commodities * * * that do not have in their price some transportation costs. * * * The expression which Mr. Fetter has set up as universal seems to me a fictitious, academic expression that is pointless. Certainly in the English fairs that he talked about, the cost of transporting the goods to the English fairs was included in the price."[7]

(Prof. Fairchild) "I claim to be familiar with the consensus of opinion of pretty much all of the leading American economists obtained by an examination of some 91 different writers, * * * out of which I find not more than three, including Professsor Fetter himself, who in any way at all would incline toward the opinion he expresses to the effect * * * that freight is not included in the delivered price at any particular point. I find the consensus of opinion of these some 88 economists exactly the reverse, that delivered price includes whatever cost is required to get the

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[5] (R) Tr. 43220-21.

[6] (R) Tr. 43978.

[7] (R) Tr. 44330-31.

goods delivered at that point.'"[8] "I think that the price * * * is the delivered price including whatever transportation cost is necessary to get it to the point of delivery. According to that answer [of Dr. Fetter] it would appear that there can't be a price of anything except at the location of the mill. There could not be a price of cement in New York City, for instance, because that is not a place where a mill is located."[9]

(Prof. Westerfield) "I would not agree that that is a proper analysis of price. * * * The price in the economics sense is the price at the point of delivery,—destination price."[10]

e. Dr. Fetter's Definition of "Market"

Dr. Fetter testified that under the basing-point system of delivered prices there is no market in the economic sense.[1]

With this testimony, the respondents' economists disagreed,—

(Prof. Griffin) "I consider a market to be * * * a place where a number of sellers vying for the patronage of a group of buyers, do make rival offers. * * * In the case of the cement industry, as it has been described, that place is the buyer's place of business, and that place is therefore a market, and therefore you have as many markets for cement as you have delivery points."[2]

(Prof. Vaile) "I do not agree with it. * * * Price is a directing force, and a market is a place where price crystallizes. There may be a market * * * wherever change

[8] (R) Tr. 44675. The witness later stated that he meant to use the term "price" instead of "delivered price" in this testimony. Tr. 45115-18.

[9] (R) Tr. 44781.

[10] (R) Tr. 45489-90.

[1] (C) Tr. 17722.

[2] (R) Tr. 43228.

of ownership takes place. * * * In the industry as described to me * * * the change of ownership takes place at or near the point of use, and at that point you get an opportunity for focusing of the major forces of supply and demand.'"[3]

(Prof. Fairchild) "I regard the market as the place where buyers and sellers exchange the goods, the place where [it] * * * is delivered to the buyer, and the basing-point system seems to me not to deny that there is a market at the place where the goods are delivered. * * * The overwhelming consensus of economists is in disagreement with Dr. Fetter's statement.'"[4]

f. Basing-Point and Law of Supply and Demand

Dr. Fetter was asked "In your opinion can the basing-point system of identical delivered prices exist or be maintained as an expression of the economic law of supply and demand?" He answered, "I think not."[1]

The respondents' economists expressed their disagreement as follows,—

> "I do not agree with Dr. Fetter's testimony. * * * The law of supply and demand is a summary of large, more basic matters back both of demand * * * and supply, * * * that there is a strong tendency under conditions of freedom of individual action * * * for supply to arise and equate with demand. * * * It seems to me perfectly possible for this system * * * of quoting prices to give expression and to permit the industry * * * to bring about that strong tendency for equation of costs and price and a cleared market.'"[2]

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[3] (R) Tr. 44174-75.

[4] (R) Tr. 44792. See also Grether (R) Tr. 45908-0[illegible]

[1] (C) Tr. 17755.

[2] Vaile (R) Tr. 44108-10.

"If I may assume that that means that this system could not exist under conditions of competition, then I would disagree, because I believe such a system could very well exist under conditions of competition."[2]

g. Basing-Point Is An Artificial System

Dr. Fetter in his testimony referred to "an artificial system of pricing such as the basing-point system."[1]

With this characterization the respondents' economists expressed their disagreement,—

"I cannot think of any reasonable definition of the word 'artificial' which would make it properly applicable to the basing-point system of marketing cement, which * * * would seem to have been a natural outgrowth of the historical development of this industry."[2]

"I do not know why that adjective 'artificial' would be applied to it. It seems a natural evolution * * *."[3]

"I do not consider anything artificial that rises spontaneously out of the conditions in an industry. * * * I do not consider it artificial."[4]

h. Forces of Competition Converge at Mill

Dr. Fetter testified that in the basing-point system, the forces of competition converge in the long run upon the mill.[1]

The respondents' economists were in disagreement,—

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[2] Fairchild (R) Tr. 44796-97. To same effect, Westerfield (R) Tr. 45597; Griffin (R) Tr. 43231-32, 43327.

[1] (C) Tr. 17747.

[2] Fairchild (R) Tr. 44794.

[3] Westerfield (R) Tr. 45595-96.

[4] Grether (R) Tr. 45909.

[1] (C) Tr. 17732.

"They also converge at the point of use. * * * A producer * * * cannot know whether the price he will get will pay the prices he has to pay * * * until it is known how the forces of supply and demand will interact at the point of use.'"[2]

"I think the forces of competition converge at the market, which * * * is the place where the goods are delivered to the buyer, or the destination point under the basing-point system.'"[3]

"They converge on the market. The market in this case is at the delivery points; that is, if you are quoting delivered prices.'"[4]

i. Identity of Price at Mill

Dr. Viner testified,—"'The identity of price which is approximated under full price competition would be an identity of price received by a producer at his mill or point of production * * *.'"[1]

The respondents' economists disagreed with this statement,—i.e.

"'As to the basic principle involved, it, frankly, just does not make any sense to me. When you buy a thing, you buy it as of a certain place. * * * Cement at point A and cement at point B are two different economic goods. * * * The buyer does not care what the mill net is; what he wants to know is what he has got to pay for the goods where he wants it, and the laws of economics which determine price always take account of that; so I pretty emphatically would disagree with that answer.'"[2]

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[2] Vaile (R) Tr. 44180-81.

[3] Fairchild (R) Tr. 44792-93. See also Tr. 45032-33.

[4] Westerfield (R) Tr. 45594-95.

[1] (C) Tr. 15644.

[2] Fairchild (R) Tr. 44765-66.

"Buyers are not interested * * * in any sense in the price at the mill at all. What they are interested in is comparing prices they have to pay at the point of use. * * * The uniformity that is expected under competitive conditions is the uniformity at the place of use.'"[3]

j. Commission Counsel's Hypothetical Question

A considerable portion of the testimony of the economists called by the Commission was based upon a hypothetical question purporting to describe the marketing method and practices in the industry. This hypothetical question has been printed in full, *supra* (pp. 2986-87).[1]

The initial question based upon these assumptions was as follows,—"Take all of those things together and then tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which you have become familiar in the course of your studies and experience?"

Dr. Viner answered,—

> "I see only one point of resemblance to a competitive price structure, and that is that at any one point different buyers will find that they can buy the product at the same price or approximately, as it would be in the case of complete competition and at any one point the sellers deliver it at a uniform price to all sellers at that point. That is the point of resemblance, the uniformity of delivered price with the qualification under competition that would be approximate or close, whereas in the absence of price competition it may be absolutely uniform. The uniformity may be perfect * * * The differences as between a price structure as outlined in that original question and a fully competitive price structure are first that regularly and systematically sales are being made at prices to yield different nets

[3] Vaile (R) Tr. 44340.

[1] See also Tr. 17639-40.

> to the seller from points at which there are more than one seller; that there is a fairly regular or regular, * * * a continuing and constant differential in net mill prices for producers at certain points according to the location * * * of the buyer, and also that there is this practice of following a leader, of meeting prices, as distinguished from the situation in a fully competitive market where every seller in degree makes some contribution all the time to the formation of price and doesn't merely accept, passively, an existing price."[2]

Dr. Viner conceded, on cross-examination, that if the assumptions had included the statement that mills very frequently sell on f.o.b. mill prices, available to all buyers who ask for them, it would have changed the question very importantly and very substantially, and that if it had also stated that only a few mills have ever consistently refused to quote and sell f.o.b. mill when asked, it also would have changed the question and his answer.[3] Also that if it had stated very clearly that large numbers of price cuts were going on continually, "it would modify very much my answer to the question by changing the character of the question decidedly."[4]

Dr. Fetter answered this same question as follows,— "I should say that it did not conform to normal competitive selling methods. * * * The economist puts up a picture of a typical competitive state of affairs, market, where competitive prices result, and this hypothetical question does not present any such situation."[5]

With these answers to the original question as propounded, the respondents' economists were in disagreement.

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[2] (C) Tr. 15688-89.

[3] (C) Tr. 15896-97.

[4] (C) Tr. 16035-37.

[5] (C) Tr. 17645, 17648.

"It is quite apparent that a method corresponding in all these respects to the one assumed would be a multiple basing-point method. * * * I consider that the multiple basing-point method is a competitive method. * * * Therefore it does correspond to a competitive method of pricing."[6]

With reference to Dr. Fetter's answer that "the conditions described do not correspond to typical competitive selling methods,"—

"I do not conceive that there is any such thing as typically competitive selling methods. * * * The form of competition must vary from one industry to another, depending upon the circumstances and the nature of the industry. * * * There is no one method in this actual world that could be called a typically competitive method."[7]

"I do not know what he [Dr. Fetter] means by a typical competitive selling method. I do not think there is any such thing."[8]

"If that means 'is compatible with', then I should say * * * all of the conditions described in this question might very well come about in connection with * * * a competitive method of pricing. * * * It does [describe a competitive method of pricing]."[9] "I cannot conceive of there being any one method which is a typical method of competition."[10] "It corresponds to the competitive methods used in many industries, where delivered prices are made * * * by sellers who are differently located * * * and who therefore have to absorb different amounts of freight. * * * I have made sufficient study to know that the methods are competitive."[11]

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[6] Griffin (R) Tr. 43206. To same effect, Vaile (R) Tr. 44327-28.

[7] Griffin (R) Tr. 43217-18.

[8] Vaile (R) Tr. 44329.

[9] Fairchild (R) Tr. 44645-46.

[10] Id., Tr. 44780.

[11] Id., Tr. 45003-04.

"It represents a type of pricing which we describe as imperfect competition. * * * It seems to me consistent with competition; does not imply collusion or conspiracy."[12]

"Economic literature abundantly now indicates that similar methods of pricing are found quite generally in American industry. * * * To assume that these are not competitive, you would have to assume that a large portion of the pricing practices of American industry are not competitive, and I am not prepared to do that. * * * It seems to me that there are competitive methods of pricing in American industry that are similar to the method described."[13]

k. Price Rigidity

Certain questions were propounded to the Commission's economists dealing both with inferences from price rigidity in general and with continuance of differentials in base prices.

Both Dr. Viner and Dr. Fetter were questioned as to the significance of a number of basing-point prices having remained unchanged from January 1933 to 1938.

Dr. Viner testified in substance that this showed that there had not been during that period any price competition, and that active price competition means a moving price that moves in response to changes in demand and supply, and that absolute uniformity and absolute constancy cannot result from the spontaneous activity of a large number of individuals acting as individuals.[1]

Dr. Fetter answered the same question as follows,—

"Such rigid prices * * * would be taken by any economist as indicating a lack of the normal or

[12] Westerfield (R) Tr. 45484-85.

[13] Grether (R) Tr. 45841-42.

[1] (C) Tr. 15654-55.

usual competitive forces at work. During all that time the delivered price to the buyers * * * would have remained unchanged."[2]

The respondents' economists definitely disagreed with each of these answers,—

(Prof. Griffin) "The normal forces of self-restraint * * * in an industry of this kind, large investments of capital and so on, would lead to that result; and * * * there is no reason for assuming that * * * the sort of rigidity that is described here would be carried out under collusion. * * * There is no reason in the nature of economic principles * * * for assuming that a monopolist * * * has any particular desire to maintain a stable price. * * * If you did have such a combination as could really dictate prices, * * * it would be more reasonable to assume that they would be changing prices from time to time, experimenting with the market to see which would be the most profitable price."[3]

(Prof. Vaile) "The phenomenon of completely rigid price over this five-year period * * * needs explanation. * * * I can't see any good reason why people who had agreed on price among themselves would have held that price constant during that entire period. * * * One of the basic tests of whether there was an agreement or not is the reasonableness in their own best interest of what they agreed to, and this * * * does not meet that test."[4]

(Prof. Fairchild) "I see no reason why under conditions of imperfect competition such as prevail in the cement industry there might not be a state of equilibrium reached which no competitor will wish to change for a considerable period. * * * At any rate, it would not be possible to in-

[2] (C) Tr. 17694.

[3] (R) Tr. 43221-22.

[4] (R) Tr. 44207-09.

fer a condition of collusion or absence of competition. * * * It would appear that Professor Viner has ignored the distinction between imperfect competition and perfect or pure competition. * * * This constant fluctuating situation of price in relation to demand and supply, which Professor Viner mentions, * * * we expect to find * * * where the conditions of pure or perfect competition prevail. But cement is produced under conditions of imperfect competition, where you do not find normally that constant fluctuation of prices meeting every variation in conditions of demand and supply."[5]

(Prof. Westerfield) "This would not create an inference of collusion. * * * I would surmise that people who are colluding would be interested in having a fixed price for five years."[6] "Economists would not understand the fact prices had been constant * * * meant that there was collusion. * * * Economists would say that usual competitive forces might be working. * * * I would take that position."[7]

(Prof. Grether) "That situation * * * does not justify an inference of collusion. * * * Except for a dip in 1937 and going over to 1938, that was a general period of price increase, as indicated by the wholesale price index of the Bureau of Labor Statistics, and one would normally expect to see, if there had been collusion, it would have raised the price along with the general movement upward."[8]

Dr. Fetter also testified,—"Even rigidity of a few months would be very extraordinary in any industry where there were competitive conditions."[9]

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[5] (R) Tr. 44770-75. See also Tr. 44789-90.

[6] (R) Tr. 45592-93.

[7] (R) Tr. 45601-03.

[8] (R) Tr. 45873-74.

[9] (C) Tr. 17695.

The respondents' economists specifically disagreed with this opinion.[10]

Dr. Viner further testified that if over a long period of time the base prices between two separate producing points have remained at a constant differential, he would consider this to be a rigidity which would be wholly inconsistent, with the existence of active genuine price competition.[11]

With this opinion the respondents' economists were in disagreement.

"The two base prices * * * presumably were set in view of production costs and relative to markets, and that one set relationship that became established * * * is quite understandable to me that the normal self-restraint of businessmen * * * would be enough to explain the continuance. * * * Various possibilities might explain it. It might be * * * that the same company having two mills has established two different base prices."[12]

"If this differential has been originally established to an equilibrium point, then, unless there has been a change in the cost of getting from the two mills separately to various points, * * * I see no reason at all to expect a change in the differential. We have that same situation, for example, as between the wheat market in Kansas City and Chicago."[13]

"Different producing regions in any nation are connected by economic forces and conditions, so that it is not unnatural that there should be a fairly constant differential. * * * It would certainly take more information about

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[10] Griffin (R) Tr. 43224; Vaile (R) Tr. 44209; Fairchild (R) Tr. 44790.

[11] (C) Tr. 15646-47.

[12] Griffin (R) Tr. 43211-12.

[13] Vaile (R) Tr. 44206-07.

the particular case * * * to lead me to an inference of collusion or the absence of competition."[14]

1. Base Prices are High?

Dr. Fetter was asked,—

> "If it should appear in this record that less than 50 per cent of sales of the number of basing-point mills were made at their own basing-point prices, and that the remainder of their sales were made at lower mill nets, some of them as much a. 60 or 70 cents a barrel lower than their own basing-point prices, what, if anything, would that indicate to you as an economist as to the average level of such basing-point prices?"

He testified,—"It would indicate that the base price must be decidedly high to permit such large deduction, and that such a great difference between the base price and the net realized price."[1]

The respondents' economists expressed their disagreement as follows,—

"That answer * * * indicates that the person making the answer had not given due regard to the phenomenon of overhead costs, the difference between overhead costs and out-of-pocket costs. It is something like saying that if a railroad can afford to give * * * a low passenger rate for Sunday excursions, * * * that is proof that the day-by-day-rate is too high. The explanation * * * lies in the distinction between average costs and out-of-pocket costs."[2]

"It seems to me a truism * * * that no buyer will pay one seller more at a moment of time and place than he will pay other sellers, that [if] your sellers are going to get

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[14] Fairchild (R) Tr. 44769-70. To same general effect, Westerfield (R) Tr. 45583.

[1] (C) Tr. 17751.

[2] Griffin (R) Tr. 43229-31.

into any other market than the immediate one * * * it would be essential under competition that they meet the delivered price of the lower-cost sellers in those consuming markets, and that meeting of competition must of necessity result in lower mill nets * * * [would the absorption of 60 or 70 cents freight indicate a high level of price?] No, the base price is held at a low, at a competitive level by the very fact that other mills are intruding into that territory."[3]

"The term 'high' is a relative term. I do not know what he is comparing that with. * * * The degree of freight-absorbing sales was not an indication of a high price, but rather of a high proportion of overhead costs in the production costs * * * and also a very undoubted presence of competition between them."[4]

"I do not think it has any necessary relation [to price level] * * * Its overhead costs are very high, and it is seeking sales at a distance in order to operate at a large scale."[5]

"I do not think that that in itself [such freight absorption] is conclusive evidence as to the level. In order to answer that definitely, one should have to know something about the structure of costs, that is, the relationship between fixed and overhead costs and variable costs in the industry."[6]

m. The 1932 Price Rise

Dr. Fetter was asked,—

> "If it should appear in evidence in this case that in July, 1932, a number of basing-point prices were advanced to the extent of 35 or 40 cents a barrel, as an economist, familiar with conditions as of that time, what would be your opinion upon the competitive conditions that existed?"

[3] Vaile (R) Tr. 44182-84.
[4] Fairchild (R) Tr. 44794-95.
[5] Westerfield (R). Tr. 45596.
[6] Grether (R) Tr. 45909-10.

He answered,—

> "It, of course, would seem to be an extra-ordinary phenomenon that prices should increase to the amount of 25, 40, nearly 50 per cent in an industry at the very depth of the depression, when the general average of prices were at the very lowest in the business cycle, and when the prices of many competitive articles were exceedingly depressed."[1]

The respondents' economists very definitely disagreed,—

(Prof. Griffin) "I do not think that it was inconsistent with a freely competitive market. If the decision to advance a price was made by some business man in view of all the facts and probable effects • • • and other business men decided to follow that price change for perhaps similar reasons."[2] "I do not see how any economist • • • could draw any inference of absence of competition. • • • When prices are advanced • • • such decisions are taken quite deliberately in view of the whole complex of circumstances • • • and in view of the anticipated results. • • • One of the companies may well have concluded that the situation was a very unprofitable one, an intolerable situation, and • • • that there was a good prospect that their competitors would follow, • • • and [it] would not indicate a power of control over price."[3]

(Prof. Vaile) "A producer must decide whether or not the going market price is the price at which he will produce. • • • There is nothing, no evidence, • • • of anything mystical or extraordinary or collusive in that situation."[4]

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[1] (C) Tr. 17695.

[2] (R) Tr. 43216-17.

[3] (R) Tr. 43224-26.

[4] (R) Tr. 44335-36.

(Prof Fairchild) "Under the conditions named it is entirely possible without combination or agreement for a competitor to raise the price and for other competitors to follow that raise. * * * After all, when you are in the depths of depression, sooner or later prices do rise, and it would be quite extraordinary if, * * * when a rise in prices comes, we would have to infer combination or collusion. * * * I would not."[5]

(Prof. Westerfield) "If prices had been abnormally low, at the bottom of depression, it is necessary for prices to rise * * *, that is the only direction in which they can move, and must start some time there. * * * [Would such a rise be consistent with natural competitive forces?] Yes, entirely."[6]

(Prof. Grether) "That particular result is compatible with a free competitive market. * * * This might very well be an act of desperation on the part of some member of the industry who felt he would rather be out of business than taking business at this level, and he, say, takes a chance and raises the price and the rest of the industry * * * follow his leadership motivated just about the same * * * [as to 'power of control over price'], under imperfect competition the essence of imperfect competition is that each seller has some control over price because he can effect the price result."[7]

[Dr. Viner testified on cross-examination that "a period of depression is consistent with a substantial increase in sales, if the price is immediately raised under certain circumstances,—if you are in that part of the depression in which the business cycle is on the upward grade."][8]

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[5] (R) Tr. 44790-91.

[6] (R) Tr. 45604-05.

[7] (R) Tr. 45907-08.

[8] (C) Tr. 15986; see also Tr. 15988.

n. Effect of Basing-Point on Depressions

Dr. Viner testified in substance that the pricing method of the cement industry as described in Commission Counsel's long hypothetical question would tend to produce and intensify a depression in our national economy.[1]

The respondents' economists disagreed with this opinion.

(Prof. Griffin) "If * * * Professor Viner meant that we would have gotten out of a depression more quickly had some other method existed, * * * then it seems to me you would have to turn to such questions as the effect of this method upon the level of prices and possibly upon the flexibility of prices. I do not think that this method has an adverse effect upon either of these. * * * I do not agree with the judgment expressed by Professor Viner."[2] When asked,—"Your answer is the same with regard to production?" he answered "Yes."[3]

(Prof. Vaile) "I do not see his [Viner's] line of reasoning. I do not see how he came to that conclusion. * * * He did not give his line of reasoning. I would not come to the same conclusion."[4]

(Prof. Fairchild) "I can't see any connection between this particular marketing system and influences tending to produce or intensify an economic depression."[5]

(Prof. Grether) "I do not think that this price policy could produce a general consequence of that sort in the American economy."[6]

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[1] (C) Tr. 15695.

[2] (R) Tr. 43215-16.

[3] (R) Tr. 43972.

[4] (R) Tr. 44336-37.

[5] (R) Tr. 44649-50.

[6] (R) Tr. 45907.

o. Is Basing-Point in the Public Interest?

Dr. Fetter was asked, "If the statement were made to you that the public interest is best protected by the long-established practice of meeting competition in the sale of cement, what would be your reaction as an economist to such a proposition?" He answered,—"If the long-established method means the basing-point method, I would disagree quite fully. I believe that it is not a method in accord with the public interest, nor in the long run in the interest of the industry."[1]

The respondents' economists disagreed with this opinion.

(Prof. Griffin) "I would not agree. * * * I recognize that there are certain arguments against that method. There is cross-hauling cost. But I would consider * * * that it had certain positive advantages,—maintaining point by point competition, competition between a number of sellers * * * at each individual point. * * * There is a competitive pressure placed upon the manufacturer in fixing his price under this system; there is also a competitive pressure placed upon price under an alternative system. I do not think that the degree of that pressure is greater in the one case than in the other, and when I find * * * that particular consideration is in balance, then the continual competition for buyer's patronage is a positive advantage in favor of this one; and then finally when I take into consideration the fact that the industry has been long established on this basis, that the capital it has invested, that trade channels are adjusted to this, * * * there is a presumption in favor of the existing method."[2]

(Prof. Vaile) "I do not agree with that testimony. * * * Under the assumption that we are dealing with an industry in which free competition is deemed to be in the

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[1] (C) Tr. 17775-76.

[2] (R) Tr. 43239-40.

public interest, then I should say that this method of quoting market prices is, since it is a competitive method, in the public interest.'"[3]

(Prof. Fairchild) "It would appear to me that this method of marketing is one in harmony with competition; that it, therefore, would tend to promote the production and marketing of cement * * * which would in the long run tend to produce cement and deliver it somewhere near its cost of production. I am not sure whether something more is required by the phrase 'effect upon the national economy'."[4] "As I think of the public interest * * * I should say that that interest is best served when such manufacturing and marketing is in the hands of private enterprise, and is operating under conditions of competition. * * * The basing-point method * * * contributes toward competition, and is more in harmony with competition than any alternative method of marketing which I can conceive of as being practicable for an industry of this sort. I draw the conclusion, therefore, that the present basing-point method * * * is not contrary to the public interest, but * * * is definitely favorable to the public interest."[5]

(Prof. Westerfield) "I feel that meeting competition is the best protection in the public interest.[6] [Competition] "tends to keep the price down near the cost of production."[7]

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[3] (R) Tr. 44135-36, 44304.

[4] (R) Tr. 44647.

[5] (R) Tr. 44811-12.

[6] (R) Tr. 45598-600.

[7] (R) Tr. 45601.

PART XX

ALTERNATIVE MARKETING METHODS

A. What Are the Possible Alternative Marketing Methods?

The respondents' economists were questioned as to what marketing methods are known that might logically be considered as alternatives for a basing-point method.

"I would * * * compare the method of marketing in question with the only reasonable alternative to that, and that it seems to me is the uniform f.o.b. plan. [As to other alternatives,] I have thought some of what the different methods * * * could be conceivably considered. One would be the optional method in which the buyer at his option chooses between a mill price and a delivered price. Another might be a limited freight absorption plan, which would be substantially similar to the present plan except that the amount of freight absorption that could be undertaken would be limited. Another, just for logical completeness, might be * * * the zone plan, in which prices were uniform over a considerable area or zone; and again just for logical completeness conceivably a postage stamp principle of pricing in which the price is the same all over the country.[1] * * * Perhaps [using a central exchange] should be included; perhaps in the same category as the postage stamp theory. It is difficult for me to conceive it as a practical matter."[2]

Those economists who were permitted to answer the question testified that the zone method of pricing, the postage stamp method, and selling cement through central ex-

[1] Griffin (R) Tr. 43124, 43131-32.

[2] Id., Tr. 43133. The suggested limitation upon the amount of permissible freight absorption "would presumably have to be made by statutory requirement, administrative order * * *"

changes are each impracticable in this industry, largely because of the important element of freight in the total delivered cost.[2]

1. The So-called Optional Method

The so-called optional method was described by Dr. Griffin (*supra*) as one "in which the buyer at his option chooses between a mill price and a delivered price."

The economists were asked as to the effects that would follow the granting of such an option to the buyer. They testified in substance that the buyer would consider terms, relative promptness of delivery and other relative factors, and would not exercise his option to buy f.o.b. mill if it resulted in a higher delivered cost.[1]

They also believed that granting such an option would only operate for a limited period and would thus not be a permanent alternative marketing method. Their conclusions as to this were stated as follows,—

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[2] Fairchild (R) Tr. 44711; Griffin (R) Tr. 43133, 43175-81, 43832; Grether (R) Tr. 45882-86. The testimony of other witnesses upon these subjects was excluded, and in some instances offers of proof to the same general effect were made. As to the impracticability of postage stamp pricing, this was conceded by Commission witness, Dr. Viner (Tr. 15658). As to sales through central exchanges, counsel for the Commission, Mr. Wooden, stated, "I do not want to object, except to point out that there has been no hint or intimation on our part * * * at any time in this case that cement ought to be sold on exchanges. * * * I personally consider the line of questioning irrelevant." (Tr. 15372, 15374)

[1] Griffin (R) Tr. 43169-70. To same effect, Vaile (R) Tr. 44318; Fairchild (R) Tr. 44727-29; Westerfield (R) Tr. 45617-18; Grether (R) Tr. 46036-37. Note also concession of Commission counsel Mr. Wooden, "I am willing to concede * * * that the buyer will take whatever method that gets him the goods to the place he wants to use it at the lowest delivered cost." (Tr. 44321)

"I think that some buyers would object to it. * * * I should say that the buyers would come to prefer one method or the other method * * * and that the manufacturer would be forced to come to one of these methods of selling, and then he would revert back to one of the two. * * * I think the two could not exist side by side."[2]

> "Q. * * * What would be the final result? A. That would be a matter of business judgment. * * * If the objection were really strong * * * then I should say that the option would be discontinued in favor of the majority desire. * * * At the time of change it certainly would disrupt the relations with the dealer."[3]

"It would probably cause a great deal of dealer dissatisfaction, because some of the dealers would have trucking facilities, others would not, and it would therefore be very disturbing to the dealer's set-up. * * * I would expect that this dealer dissatisfaction would lead them to abandoning the use of the f.o.b. quotations."[4]

"I do not think that the two could exist side by side and operate in the same market."[5]

"I do not see that it would make any difference in the degree of competition between the original producers."[6]

Summarizing these various alternatives, Dr. Griffin testified:

> "Q. Now, Professor, have you given us all of the alternatives that you have been able to bring forward for comparison with what we have pictured in our hypothetical question as to the present method? A. I have.
>
> Q. And of them all, which do you think are worthy of serious consideration and comparison? A.

[2] Griffin (R) Tr. 43172-73.

[3] Vaile (R) Tr. 44322.

[4] Westerfield (R) Tr. 45618-19.

[5] Griffin (R) Tr. 43878.

[6] Vaile (R) Tr. 44324.

> Only one. * * * That would be the plan which has been referred to here as the Fetter plan, or might be called the uniform f.o.b. mill plan."[7]

Another of these economists testified "It would seem to me that neither the postage stamp method nor a zone system, with the zones of any appreciable area, or the central exchange system would be practicable in an industry of this sort."[8] "The only other method that I can think of would be uniform f.o.b. mill base."[9]

2. A Uniform F.O.B. Mill Price

Considerable testimony was given by each of the five economists called by the respondents as to relative merits of a basing point method and the uniform f.o.b. mill method, and as to the probable results if the latter were substituted.

a. Effect on Market Area

"The effect of a uniform f.o.b. mill system would be to restrict the marketing areas of the various mills at various points, because they would not be able, under that system, to reach out through freight-absorbing sales."[1]

The effect of subsequent changes in mill price upon market area was stated as follows:

> "Under the assumption that all mills happen to raise their price together, * * * in the same amount there would be no effect on the market area. On the assumption that one mill raised its f.o.b. mill net price and others did not, that area which formerly was the market of the mill so changing its price

[7] Griffin (R) Tr. 43181-82.

[8] Fairchild (R) Tr. 44711.

[9] Fairchild (R) Tr. 44721.

[1] Grether (R) Tr. 45892-93. To same effect, Westerfield (R) Tr. 45605. This was conceded by Commission witness Dr. Fetter, Tr. 17753, 17945.

would shrink. If mill 'A' lowered its f.o.b. mill net price, and that lowering was not followed by other mills, the area would increase.'"[2]

b. Effect on Competition

"The uniform f.o.b. mill method of selling would clearly have the effect of giving fewer mills competing in each market area."[1]

"* * * It [basing point] had certain positive advantages, maintaining point by point competition, competition between a number of sellers for the patronage of buyers at each individual point. * * * The continual competition for buyer's patronage is a positive advantage. * * *"[2] "There were some other respects in which I felt that the competitive pressure was greater under the present method than under the uniform f.o.b. plan."[3]

"I say that under those assumptions (*i.e.* f.o.b. plan) you would tend to have less competition than you have now."[4]

"[Under the present system] many mills are competing for the custom of dealers * * * Now under a uniform f.o.b. mill base, this would virtually all disappear * * * Now the result of that would be that in very large areas and very many places there would never be competition between mills. In most places, I should think the dealers would find themselves able to purchase only from one mill."[5]

"I think it most likely that the maintenance of the f.o.b. system would create conditions through time that would

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[2] Vaile (R) Tr. 44268-69.

[1] Griffin (R) Tr. 43143.

[2] Id., Tr. 43239-40.

[3] Id., Tr. 43820.

[4] Vaile (R) Tr. 44269.

[5] Fairchild (R) Tr. 44724-25.

make for a less perfect market. * * * The consequences of that method, in my judgment, would be very likely to be such that you have a less perfect competitive situation.'"[6]

Commission witness Dr. Fetter was asked:

> "Q. And would it mean * * ** that in many instances the buyers would have no choice except to buy from a single seller? A. That would undoubtedly be true, in some cases."[7]

The economists were asked as to the effect of f.o.b. mill on competition between two mills located at the same or closely adjacent points.

"If two mills were located closely together, * * * the competition between those two mills would presumably become extremely keen, in order to gain volume from a certain limited area. Considering that these mills are characterized by high overhead costs and that the demand for cement is elastic (witness obviously misspoke and meant inelastic) * * * the result I would expect to be ruinous competition."[8] "The danger of that type of competition, commonly called cut-throat competition, would be so clearly in the minds of the two mill owners * * * that it would not run its full course. * * * So I would expect that their natural self-restraint would come into play."[9]

c. Would Be More Monopolistic

All of the respondents' economists testified that the f.o.b. plan would be more monopolistic.

"[An isolated mill] could act very much as a monopolist. For example, on the quality of service that it gave to the customers in that territory, it could be quite arbitrary.

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[6] Grether (R) Tr. 46049.

[7] Dr. Fetter (C) Tr. 17945.

[8] Griffin (R) Tr. 43146.

[9] Id., Tr. 43825-26.

I do not think it would have to worry a great deal about promptness of service or the adjustment of claims, or the other hundred and one things that go into making up satisfactory trade relations; because they would be presumably the only seller."[1]

"The only places where there would be new actual competition would be the places that were on the border line between the two districts * * * and therefore, in most places, that is all the other places, dealers would find themselves able to purchase only from one mill."[2]

Commission witness Dr. Fetter was in agreement generally with these conclusions when he testified: "The isolated position of the mills in certain industries creates in itself a monopolistic situation."[3] "I would recognize that there might be a limited monopoly."[4] "When you have only one seller it is not an ideal market or a real market."[5] "This isolated seller has a certain latent monopoly power."[6] "Q. And you realize, do you not, Doctor, that * * * there would be nothing to prevent that seller * * * from increasing his price? A. Yes * * * there is at the present time * * * the monopolistic principle of charging what the traffic will bear, which has its limitations. There would still be that, and that would be just as strong then as it is now."[7] "Q. * * * East would be a monopolist in his own territory? A. A limited monopolist, yes, a monopolist limited by certain marginal competition."[8] "Q. Where is the monopoly? A. The sole seller at that location."[9]

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[1] Griffin (R) Tr. 43144-45.
[2] Fairchild (R) Tr. 45187.
[3] Dr. Fetter (C) Tr. 17753-54.
[4] Id., Tr. 17900.
[5] Id., Tr. 17952.
[6] Id., Tr. 17976-77.
[7] Id., Tr. 17996.
[8] Id., Tr. 18083.
[9] Id., Tr. 18514.

d. Would Result in Higher Prices

These economists gave their reasons for concluding that prices to the consumer would tend to be higher under the uniform f.o.b. plan.

"In the case of a mill which was located in the midst of or very close to a rich market, I would think that the mill could then raise its price under this alternative plan more than they could under the present plan".[1] "* * * In a situation in which the outer fringes of the market area being controlled by a certain mill were not particularly good markets, then there might be a considerable area within which the mill in question could raise the price * * * before it ran into serious objection of having its market contracted."[2]

> "* * * they would both be interested in having those prices remain as high as possible; that is clear. If the dividing line falls, say, half-way between these two mills, * * * that same dividing line might continue to exist if the prices were 50 percent higher."[3]

"The effect, it seems to me, would inevitably be, on the assumption of each of the two mills operating in its own best interest, * * * to raise the prices near each of the two mills. * * *"[4]

> "* * * there would be a drastic reduction in the amount of competition at many of the * * * destinations. Now, competition is about the most powerful force we have had that tends to hold prices down somewhere near to the cost of production, and I feel confident that any cause which reduces competition also tends to thereby reduce the influences that are holding prices down, and leads to the probability

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[1] Griffin (R) Tr. 43147.

[2] Id., Tr. 43821. To same effect, Griffin (R) Tr. 43828-29.

[3] Griffin (R) Tr. 43842.

[4] Vaile (R) Tr. 44272.

that prices will be higher to the dealers under this system than under the present basing point system."[5]

"My general expectation * * * is that the level of cost would be raised and the price would be raised,—the price level."[6]

"The initial effect * * * might be highly variable, depending upon the location of demand and in relation to given mills * * * If you had, say, an isolated mill, * * * that mill * * * would quite likely be able to have a higher price * * * because of the absence of competition in its own market. * * * There is a strong presumption that the total net effects would be higher total average factory costs of production, and therefore, over the long period, quite likely higher total prices."[7]

"The fact that you do not have competition at each individual point is likely to lead * * * to carelessness as to costs * * * over a considerable period of time it might be a substantial factor * * * so you might very well find an increased cost of production which would offset the saving that is made in cost of transportation under the uniform f.o.b. plan."[8]

e. Would Increase Cost of Large Government Projects.

Certain of the respondents' economists were asked the following hypothetical question.

"Assume that all mills are selling on such a uniform f.o.b. mill basis, and that there is a big demand in a particular mill's market territory due to a large Government project; and assume that that mill, after

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[5] Fairchild (R) Tr. 44726.

[6] Westerfield (R) Tr. 45712-13.

[7] Grether (R) Tr. 45894-96.

[8] Griffin (R) Tr. 43649-51.

reserving a sufficient proportion of its capacity to take care fully of its commercial customers, is able to supply only a portion of the cement for the Government project; and assume that the balance of the cement required for the project has to be secured from a more distant mill. What would be the effect on the total cost of the project to the Government?'"[1]

They answered as follows:

"If you have one mill located near the proposed Government project, and that mill is not able, after taking care of its commercial business, to supply all of the Government needs, I would expect then that that mill would bid its regular commercial price * * * now, a more distant mill, knowing those facts, knowing that the nearby mill cannot supply all of the needs of the Government * * * would naturally quote their regular f.o.b. mill price plus the freight to that point, and that would presumably mean that you would have part of the supply * * * at one price, * * * and the remainder of it at a higher price. * * * The total cost would be increased."[2]

"First of all, the mill in question might * * * very likely take advantage of the situation to raise its f.o.b. price, finding itself able to sell more cement than it could produce for the time being."[3]

Similar testimony by others of the respondents' economists was offered and excluded.[4]

The point was virtually conceded by Mr. MacIntyre, of Counsel for the Commission.[5]

Dr. Viner, when asked a similar question, testified that under such circumstances the more distant mill should not

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[1] Tr. 43157.

[2] Griffin (R) Tr. 43158-59.

[3] Fairchild (R) Tr. 44726.

[4] Tr. 45900-01, 45608-11.

[5] Tr. 45611-12.

be permitted to quote below their established f.o.b. mill price, and added, "If the local mills couldn't provide all that was needed, * * * they could quote a higher price, as you have outlined the problem."[6] Dr. Fetter reached similar conclusions.[7]

f. Would Eliminate Secret Prices

The uniform f.o.b. mill plan would eliminate secret price cuts.

"Presumably it would have the effect of discouraging secret price cuts, because the existence of the secret price cut would be quite apparent. * * * If each mill has a natural market around itself, * * * then the very fact of another mill selling in that territory would be almost conclusive evidence of a secret price cut."[1]

"* * * Once this pattern be set up, this secret price cutting would be more difficult in that pattern, because whenever a mill gets beyond its economic breaking point into another mill's territory, it is obvious that it is thereby a violation of the price structure."[2]

g. Would Increase Total Capacity

In view of the change in the complaint that the present marketing method tends to increase total mill capacity and produce an excess of capacity, the respondents' economists were asked as to the probable effect of a uniform f.o.b. mill plan upon total capacity. They were unanimous in their opinion that it would tend to further increase total capacity of all mills.

"With the mills that exist, of course at the time of change there would be no change in their capacity, but some

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[6] (C) Tr. 15957.

[7] (C) Tr. 15084-85.

[1] Griffin (R) Tr. 43160-61.

[2] Grether (R) Tr. 46049-50.

of these mills with a contracted territory could not make full use of their physical capacity; other mills whose natural territory would be enlarged might expand their output a bit. * * * To reach the whole country at as low a price * * * would now require a great multiplication of the number of mills."[1]

"It would have the effect of encouraging a shifting of productive capacities. * * * There would be a tendency to increase the capacity of the mills near to consuming centers and to decrease the capacity of mills that were located far from the * * * centers. * * * It takes a very long time to decrease the mill capacities * * * so in the interim you are likely to have * * * an increase in the total capacity of the industry."[2]

> "* * * If you have a demand that was in excess of the capacity of an individual mill, * * * then the mill might be expanded on the basis of that temporary peak of demand, which, of course, would lead to overcapacity."[3]

The point was conceded by Commission witness Dr. Fetter, who testified as follows:

> "Q. If cement were sold by the principles that you have outlined, (*i.e.* uniform f.o.b. mill) * * * would you expect to see new cement mills built at various points? A. Yes. * * *
>
> Q. And * * * do you feel that that would be economically desirable? A. Not in itself, and suddenly added to the present existing capacity, and I doubt whether it would be done that way. * * *
>
> Q. Would you wish to see the excess capacity increased still further * * * by the new mills? A. No, I would not. There might be reasons that would

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[1] Westerfield (R) Tr. 45612-13.

[2] Griffin (R) Tr. 43161-62.

[3] Vaile (R) Tr. 44308.

justify it, we always have to * * * choose the best of judgment, often a choice of evils."[4]

These economists were further questioned as to the effect of such additional capacity.

"It would tend to increase the average costs that are necessary to take care of the * * * peak demand; * * * the capital would have been invested and would have become an inescapable social cost. * * * The tendency would be to increase the average total cost."[5]

"* * * you would tend to have an increased unit cost of production. There is a second consideration, * * * there would be a tendency for mills to be located near to the markets. * * * So I would expect on that ground also to find an increased cost of production."[6]

h. Delivered Costs Would Remain Identical

As the complaint alleges (Count Two, Par. 8) a difference of one cent per barrel will deflect the sale of cement, the economist gave testimony to the same effect:

"From the point of view of having identical prices, that is, of net costs to the buyers, there would be no difference between these two plans. Any plan would have to give you that."[7]

The point was conceded by Commission witness, Dr. Viner, who testified:

"* * * That kind of identity [of price] if it is not * * * absolutely uniform and continuous, * * *

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[4] Dr. Fetter (C) Tr. 18020-21.

[5] Vaile (R) Tr. 44308-09.

[6] Griffin (R) Tr. 43162-63. To same effect, Westerfield (R) Tr. 45613.

[7] Griffin (R) Tr. 43509.

that sort of identity would result from most kinds of price systems."[2]

It was also conceded by Commission witness Dr. Fetter:

"Q. So * * * under these conditions that we have been discussing [i.e. uniform f.o.b. mill plan] you would expect to find identical prices quoted at each point in that market area by the two mills? A. Yes. * * *[3]

Q. When you have such a marginal area of competition between the two market areas, would you not always expect the mills quoting there to quote the same prices at any one point? A. That is what the marginal area * * * means; it means the point at which they are. * * *

Q. * * * You would expect to find selling at the same prices at the same time at that marginal point? A. Yes, because by that definition that is what that marginal line is."[4]

B. Testimony of Cement Executives as to Effect of Uniform F.O.B. Mill Price.

The testimony of the respondents' economists as to the effects of selling at a uniform f.o.b. mill price was supplemented by testimony of officials of various cement companies.

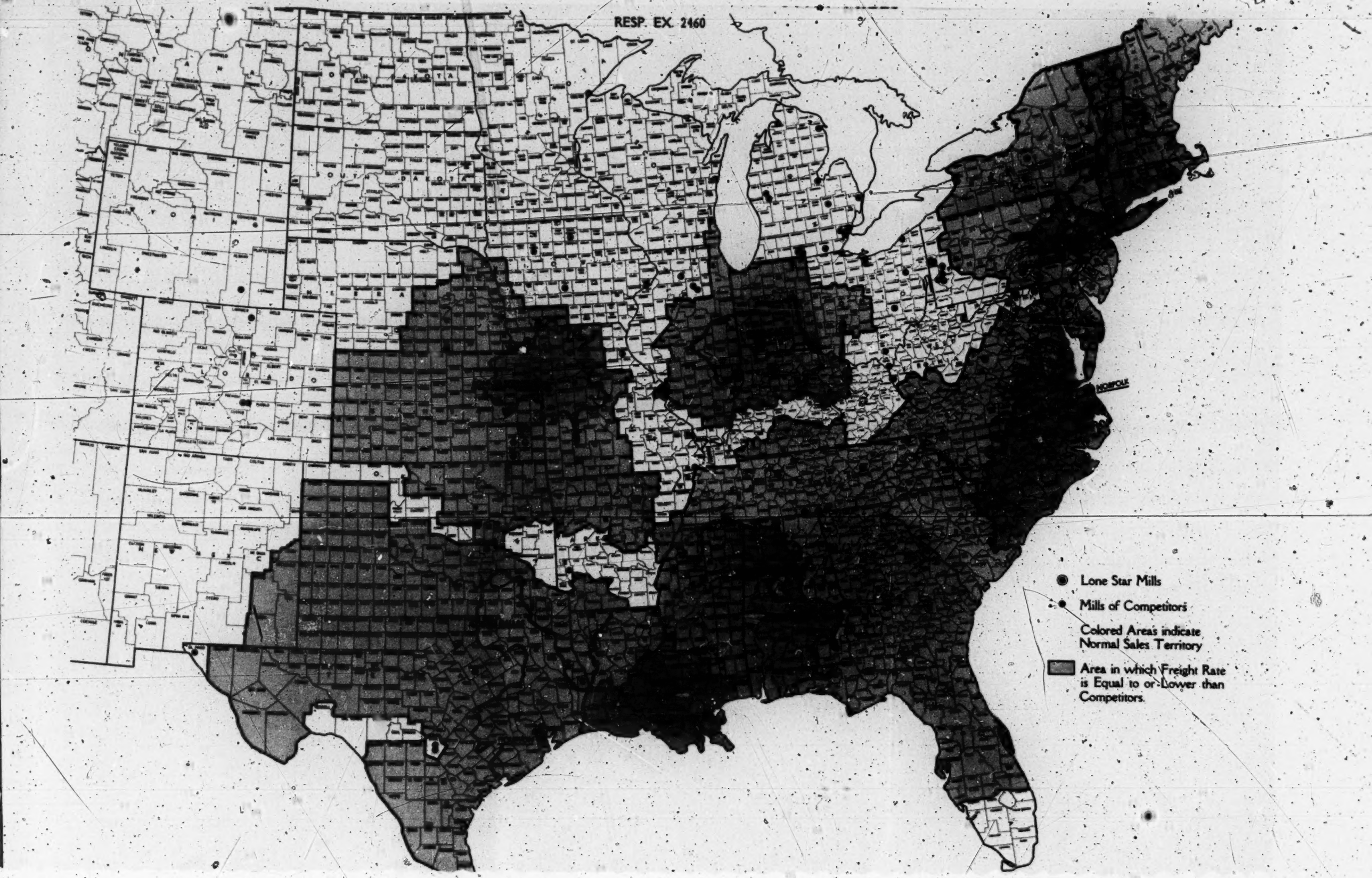
Charles L. Hogan, President of Lone Star Cement Corporation (one of the so-called "chain mill companies," and owning ten cement mills in various parts of the United States), testified as to the effects of such f.o.b. mill selling at each of the company's ten mills. His testimony was also in explanation of a map Resp. Ex. 2460, reproduced here as chart XX-A) on which was shown the area within which each of these ten mills was selling under the basing-

[2] Dr. Viner (C) Tr. 15644.

[3] Dr. Fetter (C) Tr. 18064.

[4] Dr. Fetter (C) Tr. 18069-70.

RESP. EX. 2460


Lone Star Mills
Mills of Competitors
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Equal to or Lower than Competitors.

point method, and the more restricted area around each mill within which its sales would have to be made if sales were f.o.b. mill.

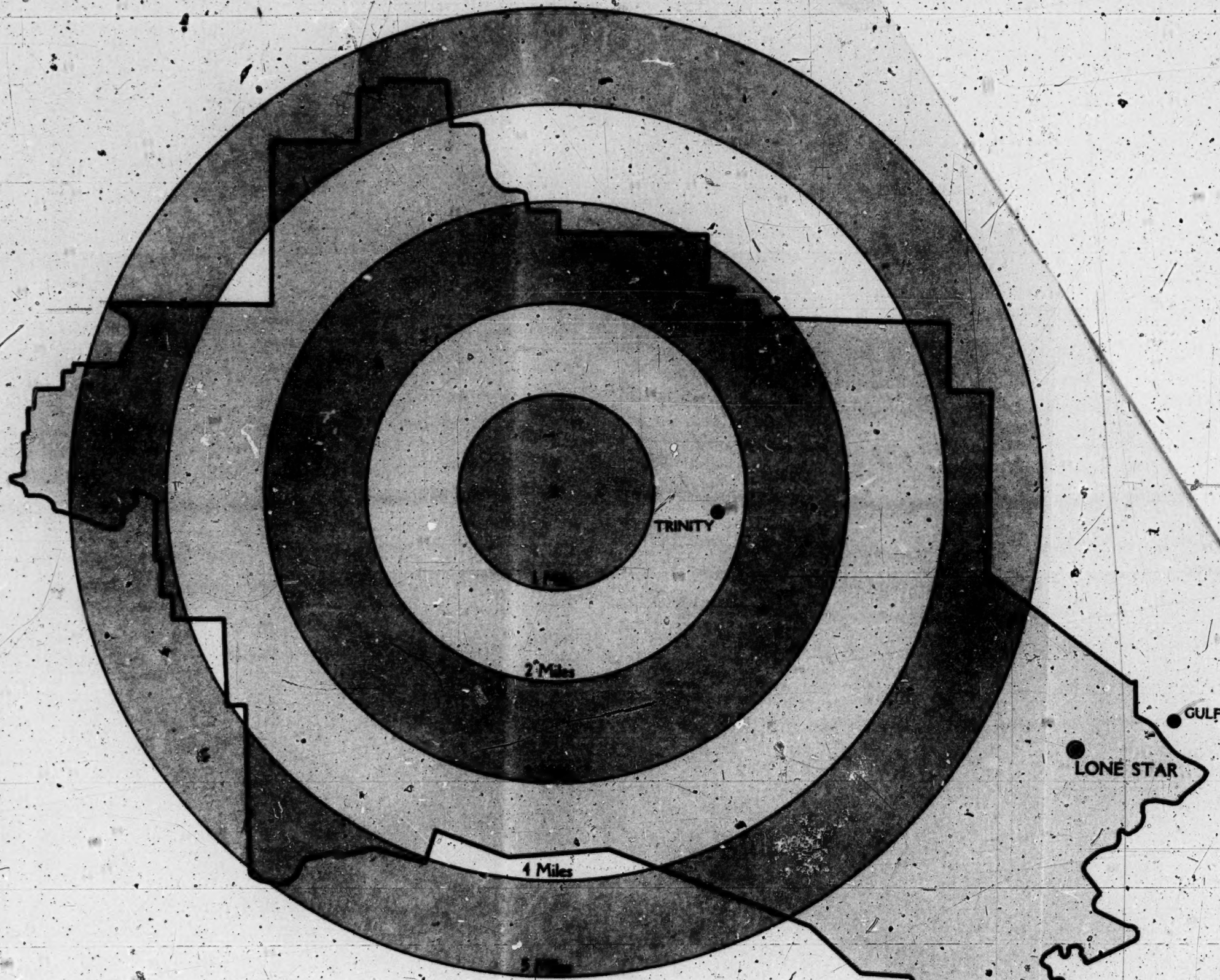
As an example of a mill having no near-by competitor, Mr. Hogan testified as follows as to the company's Norfolk, Virginia mill,—

> "The Norfolk mill, as this territory indicates, sells down in this area, into South Carolina, all within this green area up along the coast of Delaware and the City of Washington.
>
> Because of our favorable location as to freight rates, and being the only mill in that area, we would have a monopoly, so to speak, on the business on that basis.
>
> Even in the City of Washington, we could control the City of Washington, absolutely on that basis, because we have water rates up here which we use, and anybody [now] selling in the City of Washington is meeting our price or going below. • • • But all in that green area—all of it—would fall into the Norfolk mill because of a low or lower freight rate than anybody else has."[1]

As an example of three mills situated close together, in which the Lone Star mill would be affected adversely, he described the situation at Houston, Texas,—

> "This map [referring to Resp. Ex. 2461, reproduced here as chart XX-B] is an engineer's map of the City of Houston. • • • Our cement mill • • • is about • • • five and three-quarter miles from the center of the city. • • • The location of the Trinity cement mill • • • is about four and one-half miles closer to the center of the city. • • • Gulf Portland • • • is a little further away from the City of Houston than we are. • • • The conditions now present in there • • • the railroad freight rates [of Trinity and Lone Star] are the same. But if we were selling on an f.o.b. mill basis and the Trinity mill elected to truck, we would be at a decided dis-

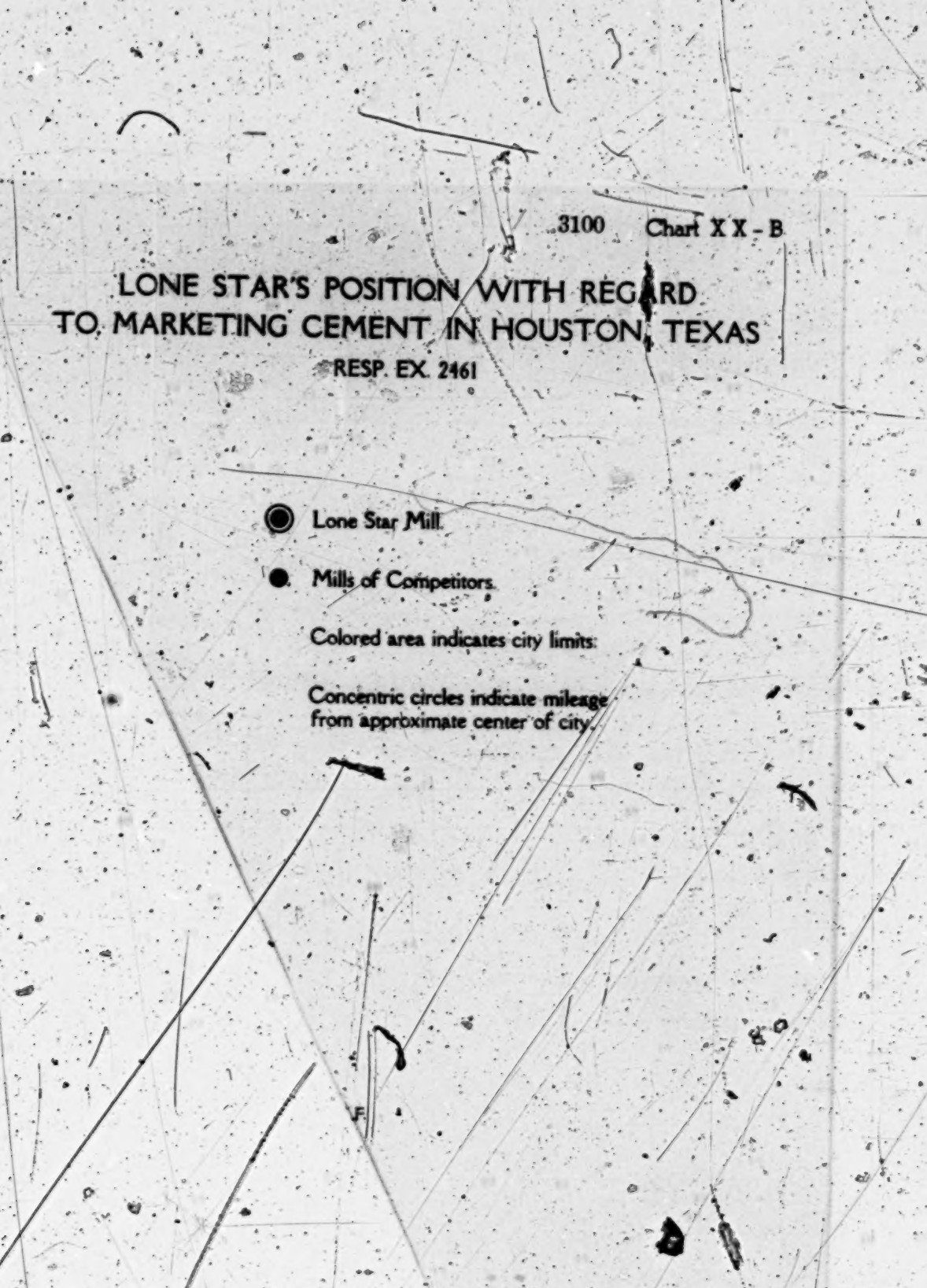
[1] (R) Tr. 34607.


TRINITY
1 Mile
2 Miles
4 Miles
5 Miles
GULF
LONE STAR

3100 Chart X X - B

LONE STAR'S POSITION WITH REGARD TO MARKETING CEMENT IN HOUSTON, TEXAS

RESP. EX. 2461



> advantage; in fact, at such a disadvantage that I have considered that we would be practically shut out of the City of Houston."[2]

and further,

> "In my judgment, the Trinity mill could absolutely shut us out of the City of Houston."[3]

As an example of a similar situation in which Lone Star would be benefited, he testified as to the mill at Dallas, Texas,—

> "The Dallas mill is located, as indicated * * * there being two cement mills there. And the green area, running down to the black dotted line, about half way through the state, shows the part of the State of Texas that would remain to those two mills. * * * In the City of Dallas, we are two miles closer than Trinity. On a freight rate basis, they are equal; if it came to a trucking rate, we would have the advantage."[4]

As a further example of the disadvantage that can arise from a small difference in distance from an important market, he testified as to situation in Washington, D. C.,—

> "We have a situation in the City of Washington * * * Our silos are about three-eighths of a mile further from the City than the silos of competitors. But despite that short distance * * * we have found it impossible to market our cement in the City of Washington direct from those silos."[5]

As an example of a group of mills which would all be adversely affected, he testified as to Birmingham, Alabama,—

> "Birmingham is something like the Lehigh Valley situation, five cement mills. They are pretty close together down there. Three large ones in Birming-

[2] (R) Tr. 34616-17.
[3] (R) Tr. 34618.
[4] (R) Tr. 34615.
[5] (R) Tr. 34617.

> ham, * * * would be on an even basis in this territory, * * * [a] very small area, doesn't have enough business to run one cement plant, let alone three. If we attempt to go to the east, * * * we run into the other cement mills, which, by f.o.b. price, could keep us out or keep anybody out. * * * [In Birmingham] there isn't enough business there to run one mill for one month. They are all big plants. * * * The five mills are there, because of the deposits of limestone * * * which they found was rather peculiar to the City of Birmingham, and they were put there with the idea of being close to the coal fields and fuel supply, things of that kind, so they could serve this territory. * * * Most of them ship to the tip of Florida. * * * The five mills, at the time they were built, seemed to have been a very good thing, * * * and they have a big territory this way to cover (indicating on Resp. Ex. 2460) under the present method of selling:"[6]

As to the effect upon the Nazareth, Pennsylvania mill, situated in the large cluster of mills in the Lehigh Valley, he testified,—

> "The Nazareth mill at present ships into a territory extending from North Carolina to the Canadian border, and as far west as Pittsburgh. Under a system of f.o.b. mill selling, we would be restricted to this green area (indicating on Resp. Ex. 2460). * * * Our mill at Nazareth is located in an area where there are three mills within several miles, and there isn't enough demand to support one mill for one day. * * * The Lehigh Valley mills, of which there are a great number, would be restricted to selling in here * * * in this green area, including New York City and Long Island. The Hudson River mills also sell in New York City * * * and would be able to put their prices down so as to stop those [Lehigh Valley] mills from coming in there. * * * Under that kind of competition they [the Lehigh Valley mills] would have a very hard time, and they would even be in a position then

[6] (R) Tr. 3460?-09.

that it would be hard for them to survive. * * * Under that method, I think the competition would begin to reduce their price in trying to survive, trying to see who would survive. * * * We [Lone Star] have mills in several other territories. * * * We could maintain a mill in the Lehigh Valley, but those single plant fellows would have to go out of business. I notice from reading their reports, that they have a hard time living.'"

Summarizing the entire Lone Star situation under an f.o.b. mill plan, Mr. Hogan testified,—

"The testimony I have given is the result of a study I have carefully made of the situation, and based on our experience have established * * * what we know from the rate situation to be the lines of marketing in our territory."[8]

[The mills adversely affected],—

"Birmingham and Nazareth, and, to some extent, New York [*i.e.* Hudson, N. Y.] also; and the Dallas mill. * * * In Houston * * * we are shut out of the city. * * * Dallas would be crippled badly. * * * The consumption is so small both at Birmingham and Nazareth. * * * In the Birmingham district I don't think there would be enough business to keep one mill running very well. There are three there. In Nazareth it would keep about, four or five out of twenty mills running.[9]

As for the Hudson mills, * * * there are three or four mills up there that participate in that area. * * * Now that would be a bad place for us, because until we found some way of getting our cement to the Hudson River different from what we have now, the method we use now, in which we have to absorb eight cents a barrel freight rate, together with the cost of hiring men to load out of the warehouse, we

[7] (R) Tr. 34597-600.

[8] (R) Tr. 34603.

[9] (R) Tr. 34621-23.

would be at a disadvantage, and we would then have only left to us Connecticut, Massachusetts, and parts of New Hampshire and Vermont in which we might try to sell."[10]

As to the effect on prices, he testified as follows,—

"In the areas like Lehigh Valley, the first result would be lower prices, and that would continue until some of the cement companies would stop operating or go out of business. The same would be true at Birmingham and at Dallas."[11]

Harold M. Scott, President of the Keystone Portland Cement Company, another "Lehigh Valley" plant, testified as follows,—

"* * * it was and is our belief that if we are confined to making sales only f.o.b. our mill and denied or prohibited from absorbing freight so that we can meet competition of other producers as we reach out, that it would work a very great hardship on our company, and how far it might go is hard to tell, because our plant is located in the Lehigh Valley district, where there is a large concentration of producing units. * * * We had a map prepared to show us what it would mean,—that is, a map showing the rather small territory to which our freight rates are lower than competing mills, and if a fostering and an encouragement of a method of selling that would set up such a regimentation or result that we would be limited in that to that small area, well, we might just as well close the plant up."[12] [Witness referred to map, Resp. Ex. 1417.]

M. Moss Alexander, President of Missouri Portland Cement Company, testified,—

"We came to the conclusion that the fluctuation in demand geographically would bring about a feast

[10] (R). Tr. 34624.

[11] (R) Tr. 34623-24.

[12] (R) Tr. 27580-81.

or a famine operation if we were to do so" (i.e. sell at an f.o.b. mill price).[13]

The stipulated testimony of William R. Blair, Sales Manager of the El Paso, Texas, plant of Southwestern Portland Cement Company, includes the following,—

> "El Paso sells all the cement consumed in the area immediately around our mill, and if it were possible, we would prefer to sell all the cement we produce in this area in which we are able to obtain our maximum mill net. However, it is absolutely necessary for us to sell cement outside of this limited area in order to obtain a volume of sales which will allow us to operate our mill economically and to keep anything like a regular operation of our plant."[14]

Walter C. Russell, Vice-President and General Manager of the Peerless Cement Company, testified as follows,—

> "I have tried to understand what would happen under that so-called f.o.b. mill basis * * * but I have never been able to give consideration to * * * a pricing method which has seemed to me to be completely impractical or impossible to put into practice."[15]

F. B. Warren, Vice-President of Bessemer Limestone & Cement Company, testified,—

> "* * * my experience leads me to think that if we start selling f.o.b. mill, we will undermine all that work, leave ourselves in a position where our dealer organization loses faith in us, and if they leave us, we would be faced with a job of finding our own way into those markets. * * * We would find ourselves eventually where we had to go in there and establish warehouses and offices and man them at tremendous expense. It would cost us much more to get our cement into the hands of the users than it does under our present method; selling f.o.b. mill runs you right back to where there is only one place to compete. * * *

---

[13] (R) Tr. 37197.

[14] (R) Tr. 38943-44.

[15] (R) Tr. 34329.

> We cannot get out and compete with our competitors at the points where the business is if we set in to selling f.o.b. the mill."[16]

Dewey T. Meyers, Traffic Manager of the Huron Portland Cement Company, testified as follows,—

[Re variety of freight rates.]

> "From Oswego to Canandaigua there are at least three different rates via at least four different routes, and there is a great spread in those rates. From Buffalo to Canandaigua there are at least four different freight rates, with different routes, with a great spread between the low and the high."[17]

The witness testified that

> "A purchaser at Canandaigua would have to make his selection of those rates and find out which one he wanted to use and that there are many other destinations in his territory in which the same difficulty arise if the purchaser bought f.o.b. plant."[18]
>
> • • •

and further,

> "Some time ago I made a study of the shipments that move from our Cleveland plant into the Muskingum Valley • • • to see how much money we saved the Government by selling on a delivered basis • • • because of the freight rate increases which came along during the shipping period. • • • [If sold on a plant basis] the Government would have paid the increased transportation. • • • about $5000 or $6000.
>
> • • •
>
> There are certain destinations where we would rather ship from one plant than another at a slightly higher rate, to give the customer the same service that he would get or better service than he would get from a competitor."[19]

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[16] (R) Tr. 32170.

[17] (R) Tr. 33358-59.

[18] (R) Tr. 33359.

[19] (R) Tr. 33363-66.

Mr. F. M. Coogan, Vice President of Alpha Portland Cement Company, when questioned as to the effect of quoting f.o.b. mill prices, testified:

> "My answer is that monopoly for some and bankruptcy for some others. * * * In a great many districts some of the best types of mill in the country * * * would go in bankruptcy. They must of necessity. * * * It depends on the location and the production and the consumptive capacity of the district in which those particular mills happen to be located. * * * It would mean bankruptcy for some, monopoly for others, and eventually higher prices to the public. * * * Bankruptcy does not take out the productive capacity of a mill; it might put it in new hands but it does not necessarily take it out of the picture. * * * It might be taken over by other people at a bankruptcy sale and continue to operate."[20]

Mr. J. Brobston, as Vice President of Hercules Cement Company, wrote the following on March 24, 1936 [Resp. Ex. 1086], at a time when Congress was considering the amendment of the Robinson Patman Act in a way which would outlaw basing point pricing:

> "As you requested at the Board Meeting I am outlining for you the reasons for my belief that the legislation now being considered at Washington which will affect our present methods of quoting and selling Hercules Cement, will be highly inimical, and probably actually disastrous to us.
>
> While we have a nominal base price at our mill competitive conditions are such that on at least half of our output we do not receive this base price. This is due to the fact that our customers when buying cement insist that our price to them, at the point where they wish it delivered, shall be as low as the price at which they can purchase, at that point, any others brand of standard portland cement.
>
> These competitive conditions have arisen through the erection of mills in sections formerly served practically exclusively by Lehigh Valley Mills. When the

[20] (R) Tr. 24873-74, 24879-80.

Dexter plant at Nazareth was started in 1900 we shipped cement as far as Duluth, Omaha, Charleston, New Orleans and Dallas, Texas, but with the erection of new cement plants, having lower freight rates to these and other markets, delivered prices were quoted at these points, which it was impossible for us to meet; as, after deducting the freight on our product to destination, the net return to us was less than our cost. In this way our market has gradually contracted until today our sales are confined to a very small area, and even in this small area, so many of the points of consumption enjoy freight rates from competing mills lower than the rate from our mill, that when we meet the price made by our competitors it results, as stated above, in our realizing less than our nominal base price. Whether we will quote in any market is determined by deducting from the price we find that our competitors are quoting, the freight rate from our mill; and then deciding whether the net price we will so realize is too low for us to consider. The minimum net price we will consider on any order is determined by our judgment as to whether the reduction in our average price caused by taking orders below our nominal base, will be more than offset by the reduced cost of our product secured by increased operation.

The laws now being considered would require us to have one base price at our mill to all customers, regardless of point of delivery. This would prevent us selling any cement when it was to be used or sold at any point where the transportation cost to destination from any other cement plant was less than ours. As you know, 25% of the capacity of all the cement mills in the U. S. is in the District in which we are located and limiting our sales to the points to which our freight rates are as low or lower than those from any other cement producer would reduce our sales to approximately 10% of our capacity; and in spite of the fact that we have a mill which has been thoroughly modernized and is one of the lowest cost producers in the district, operation at this rate would be absolutely ruinous.

* * *

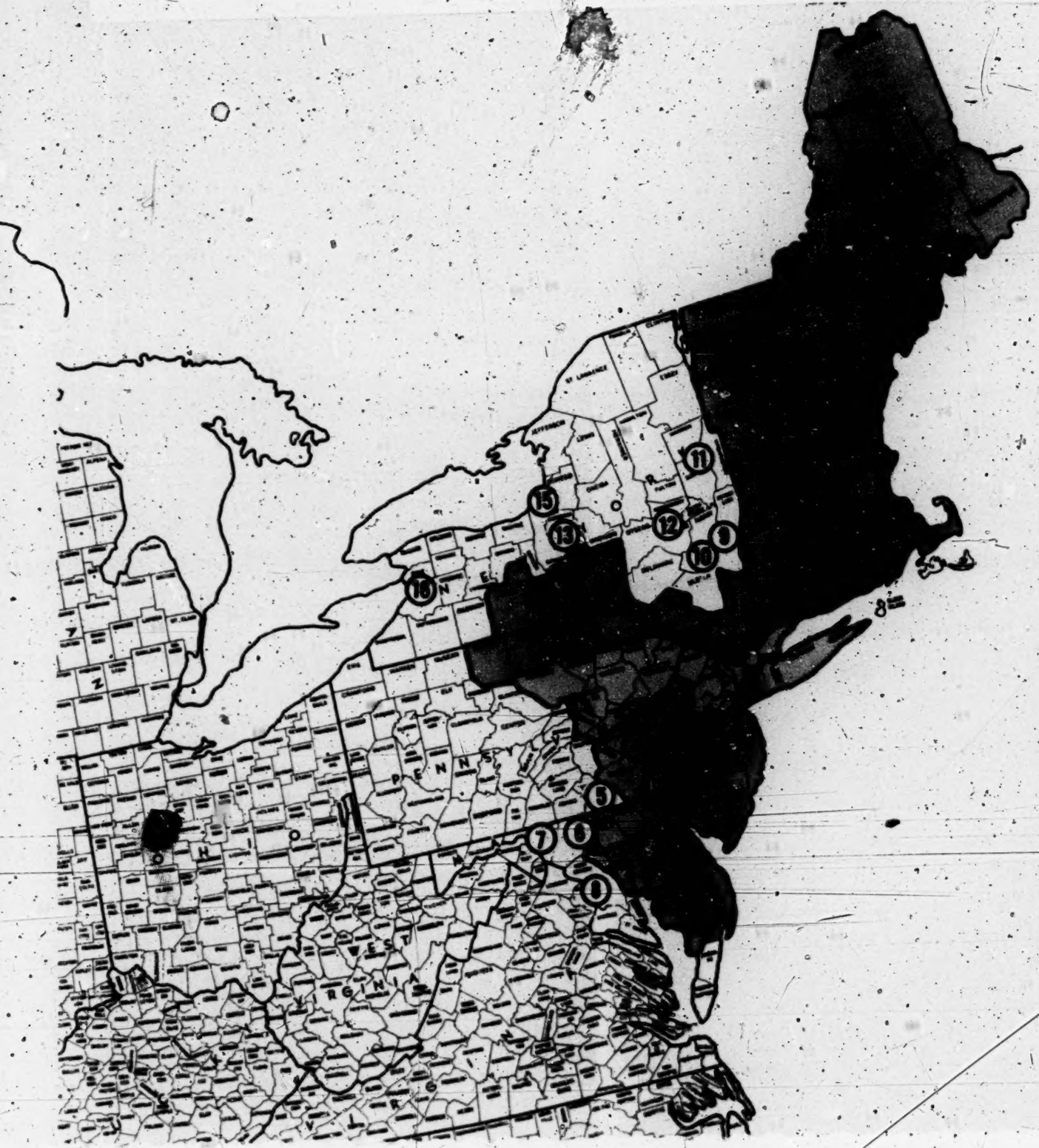
The apparent objects of the bills under consideration are to prevent our quoting delivered prices, and using so called basing points from which to calculate these prices. We quote prices delivered because our customers must be assured that the price at which they receive our cement is no higher than the price their competitors are paying; and it is essential for us to know all freight rates from the shipping points of our competitors, (the so called basing points) in order that our competitors will be competitive.

To be perfectly frank, if we are compelled to do business as is apparently contemplated by the authors of the bills in question, I do not know how the Hercules Company could continue to operate.

Being, as we are, an individual unit of comparatively small size located in the district having the heaviest productive capacity in the Country, our situation would be most unfortunate.

Having, as we do, a modernized low cost mill, a good rock deposit and a first class organization, I have never had any fear that we could not continue to successfully compete with other producers; but if we are to be limited in our efforts by legislation that will slowly strangle us, our case would be hopeless."

A number of maps and tabulations were introduced by these and other respondents to show the territory within which they have a freight advantage and to which they would presumably be restricted in their sales under a uniform f.o.b. mill price basis. (See Resp. Exs. 2187, 2189, 2385, 2459-2461, 2467-2472, 2543, 2647-2648, 2816, 2867, 2882, 3012, 3058, 3408.) Certain of these maps are reproduced herewith,—Chart XX-C showing these territories for Edison Cement Company; Chart XX-D, for National Portland Cement Company; and Chart XX-E for Cumberland Portland Cement Company. In each instance the green area indicates their present selling territory, and the pink area the territory to which they would presumably be restricted under a uniform f.o.b. mill price.



Edison Mill, New Village, N. J.

Mills of Competitors

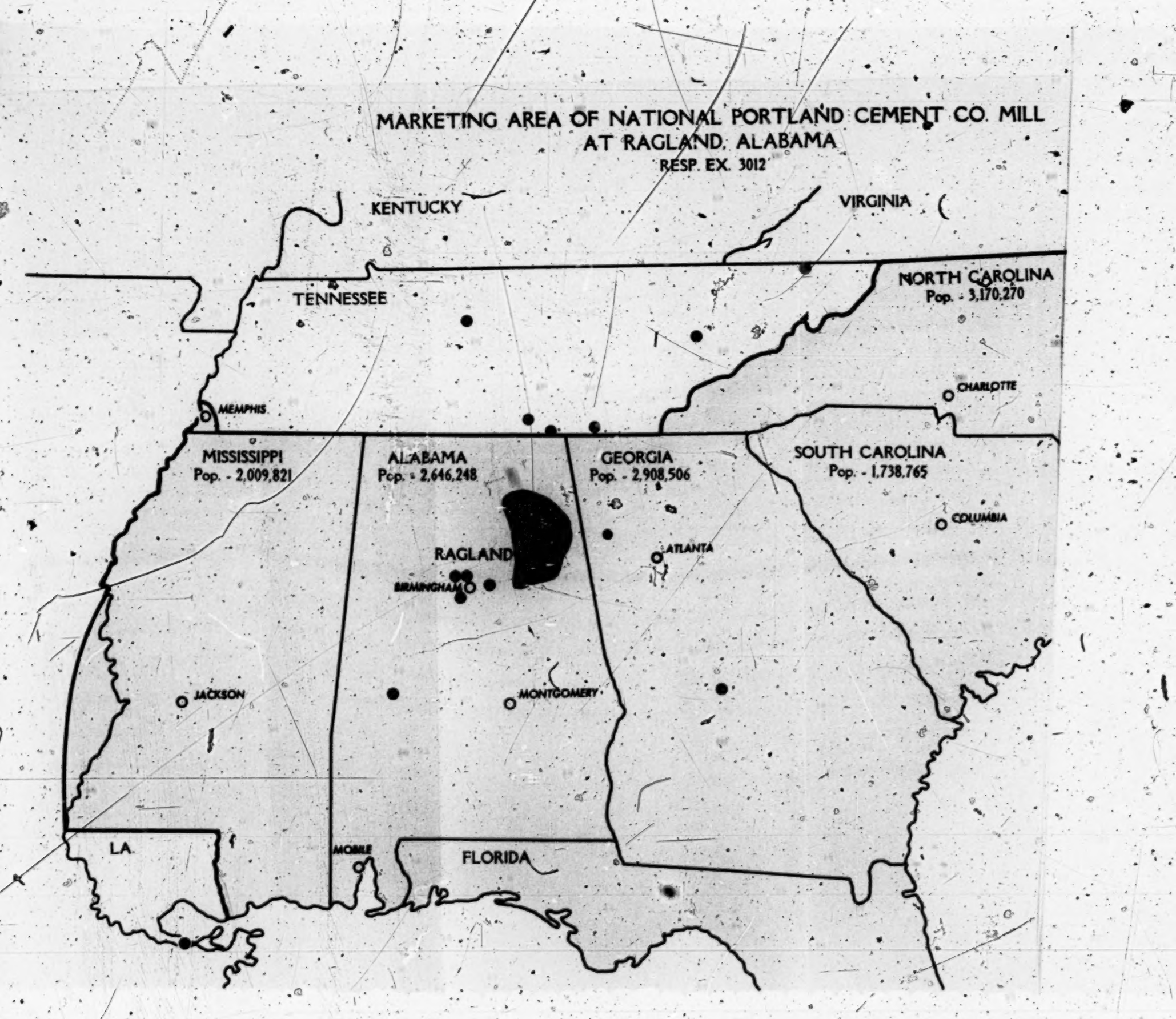
2 --	LEHIGH VALLEY GROUP		
3 --	ALLENTOWN	CONSHOHOCKEN,	PA.
4 --	ALLENTOWN	EVANSVILLE,	PA.
5 --	MEDUSA	YORK,	PA.
6 --	LEHIGH	UNION BRIDGE,	MD.
7 --	NORTH AMERICAN	SECURITY,	MD.
8 --	LONE STAR	WASHINGTON,	D. C.
9 --	UNIVERSAL ATLAS	HUDSON,	N. Y.
	LONE STAR	"	"
10 --	NORTH AMERICAN	ALSEN,	N. Y.
	ALPHA	"	"
	LEHIGH	"	"
11 --	GLENS FALLS	GLENS FALLS,	N. Y.
12 --	NORTH AMERICAN	HOWES CAVE,	N. Y.
13 --	ALPHA	JAMESVILLE,	N. Y.
14 --	PENN-DIXIE	PORTLAND POINT,	N. Y.
15 --	HURON	OSWEGO,	N. Y.
16 --	LEHIGH	BUFFALO,	N. Y.
	FEDERAL	"	"
17 --	LAWRENCE	ROCKLAND,	ME.

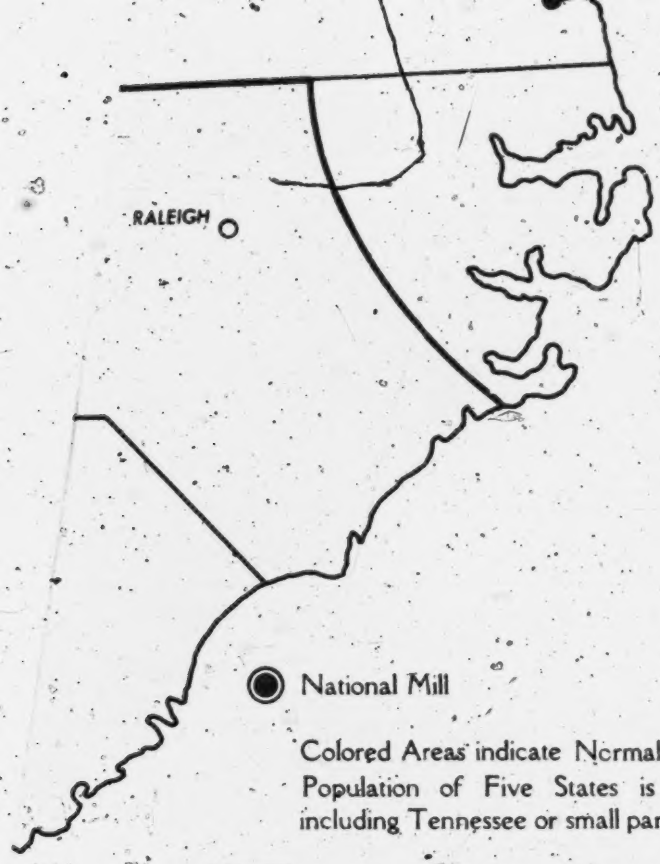
Colored Areas indicate Normal Sales Territory.

Area in which Freight Rate is Equal to or Lower than Competitors.

MARKETING AREA OF NATIONAL PORTLAND CEMENT CO. MILL AT RAGLAND, ALABAMA

RESP. EX. 3012





National Mill

Colored Areas indicate Normal Sales Territory. Population of Five States is 12,473,610 not including Tennessee or small parts of other states.

Area in which Freight Rate is Lower than Competitors, having approximate population of 72,500.

Mills of Important Competitors.

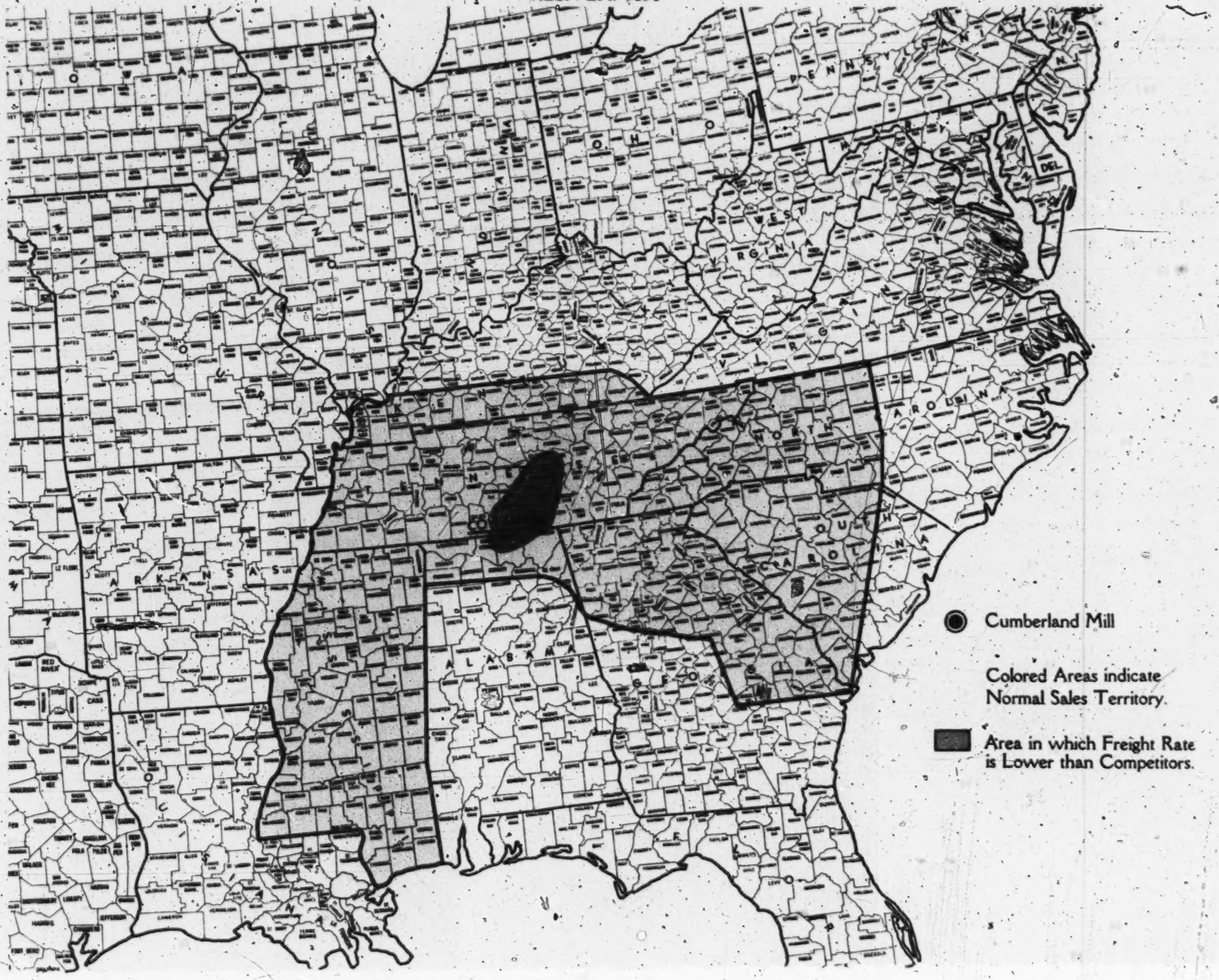
Important Markets.

Freight Rate and Mileage from Ragland, Alabama to:

		Miles	¢ per bbl.
BIRMINGHAM,	ALA.	47	38
ATLANTA,	GA.	119	49
MONTGOMERY,	ALA.	144	53
JACKSON,	MISS.	295	68
MEMPHIS,	TENN.	298	68
MOBILE,	ALA.	313	72
COLUMBIA,	S.C.	346	76
CHARLOTTE,	N.C.	375	76
RALEIGH,	N.C.	540	95

THE WHEELER CHART CO. N.Y.

RESP. EX. 3058


Cumberland Mill
Colored Areas indicate Normal Sales Territory.
Area in which Freight Rate is Lower than Competitors.